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ABSTRACT

Published November 4, 1975 in the Federal Register, these Regulations have been developed by the Bureau of Indian Affairs (BIA) to assist American Indians in implementation of the Indian Self-Determination and Education Assistance Act (PL 93-368). Prepared for tribal leaders and policymakers, this handbook analyzes the Regulations from the perspective of tribal policymakers, presents options as provided by the Regulations for creative tribal programming and development, and provides specific examples of how the Regulations' tools (self-determination grants, BIA program contracts, planning for BIA operated programs, and gaining access to Federal personnel) can best be used to help tribes solve problems and achieve goals. Divided into three major sections, this handbook includes the following: (1) Key Principles of the Self-Determination Act and Regulations; (2) Analysis of the Title I Self-Determination Regulations (grants, contracting, tribal planning for BIA operated programs, and personnel tools under the Act); (3) Options and Considerations in Using the Tools of the Self-Determination Regulations (grants program options and tools, considerations in deciding whether to contract, consideration in securing personnel for contracted programs, integrating self-determination tools, and flow chart for contracting actions). (JC)

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HANDBOOK FOR DECISION MAKERS

ON

TITLE I OF THE

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Bureau of Indian Affairs
Department of the Interior
Washington, D.C.

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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INTRODUCTION

The Indian Self-Determination and Education Assistance Act (P.L. 93-638) is the culmination of almost ten years of effort--by three Presidents, Congress, the Federal agencies, and most importantly, the Indian tribes1/ and people--to set a new direction for Federal Indian policy. The Act specifically recognizes the right of Indian people to direct their own destinies, while at the same time preserving their special rights and trustee status with the Federal Government.

With the passage of the P.L. 93-638 on January 4, 1975, the Bureau of Indian Affairs began to develop the regulations needed to implement the provisions of the Act. Through numerous consultation sessions with tribal and other interested groups throughout the country, the Bureau developed a set of regulations which it believes implement the intent of Congress and respond to the express needs and concerns of tribal leaders.

On November 4, 1975, the final Regulations [25 CFR Parts 271-277; 41 CFR Part 14H-70] were published in the Federal Register. On December 4, 1975, they became legally effective and available for tribes to use. Tribes are not required to used the provisions of the Act; but if they do decide to take advantage of them, they will find that the Act and Regulations offer new options and opportunities for self-development and self-determination. The Regulations provide tribes with four new or improved tools--self-determination grants, contracting of authorized Bureau programs, planning for Bureau operated programs, and access to Federal personnel. The Regulations were written to make each of these tools as broad and flexible as possible to permit a tribe to adapt them to its own unique needs, goals, and structure.

This Handbook has been prepared for tribal leaders and policymakers to assist them in using the Regulations and by so doing take advantage of the numerous opportunities they offer. It analyzes the Regulations from the perspective of tribal policymakers. presents the options which the Regulations offer for creative tribal programming and development, and provides some examples of how the tools provided by the Regs could be used to help tribes solve problems and achieve their tribal goals.

1/ § 271.2(h) "Indian tribe" means any Indian Tribe, Band, Nation, Rancheria, Pueblo, Colony or Community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is federally recognized as eligible by the United States Government through the Secretary for the special programs and services provided by the Secretary to Indians because of their status as Indians.

The first Chapter of this Handbook, Key Principles of the Indian Self-Determination Act and Regulations; provides an overview of the Act and Regulations. It sets out the basic principles and policies embodied in those documents and discusses their implications for tribes and the Bureau.

Chapter II, Analysis of the Title 1 Self-Determination Regulations, provides an in-depth analysis of the regulations themselves, as they are long and complex; their legal format adds to their complexity. The Handbook analyzes each major provision of the Regulations, outlines the rights and responsibilities they present to tribes and the Bureau, and discusses the varied options and opportunities provided. It provides tribal leaders with the basic information they need on the Regulations, and highlights those places where decisions by tribal policymakers can be made.

Chapter III, Options and Considerations in Using the Tools of the Self-Determination Regulations, provides some examples of how tribes may use the Regulations in support of tribal priorities. It discusses some of the benefits which the grants, contracting, and personnel tools offer tribes; sets out situations in which the tools may or may not be appropriate to use; and gives examples of how the tools can be adapted and combined in innovative ways to address problems tribal leaders must deal with every day.

The Handbook does not provide technical information on using the Regulations, such as the technical aspects of filling out a contract application or negotiating the employment of Bureau personnel. That information will be contained in the Guidelines, which are being prepared in a "how-to" format to provide information on the mechanics of implementing the Regulations. But that detailed information will be needed only after tribal policymakers have determined that they want to use the Regulations and how they want to use them. This Handbook is designed primarily to help them make those essential policy decisions related to the Indian Self-Determination Act. Also, nothing contained in the Handbook sets any new requirements for using the Act. The Act and Regulations are the only documents which set binding legal requirements and they can only be changed through the formal amendment process set out in the Regulations, themselves. The material in the Handbook is designed to provide tribal leaders with a general explanation of the potential of the Act and not, in any way, to limit that potential.

CHAPTER I

KEY PRINCIPLES OF THE SELF-DETERMINATION ACT AND REGULATIONS

"Self-Determination" means that tribes are entitled to establish their own priorities and goals without Federal domination. Tribes have always established tribal priorities--increased economic development, increased employment, improved social services to its people. Under the Self-Determination policy, the Federal Government is committed to accept and support tribal government judgements based on the needs and goals of their people.

In some cases, tribes may be able to achieve their objectives using their own resources. However, Bureau and other Federal programs are also major sources of funds and manpower for most tribes. In the past, Federal programs have not always accepted tribally-established priorities and, as a result, Federal resources have not always been used in support of tribal priorities. The Self-Determination Act and Regulations provide tribes with specific tools to assure that the Bureau programs shall comform with tribal priorities.

Building on these basic concepts, the Regulations issued pursuant to the Self-Determination Act establish certain other key principles. The principles establish and reaffirm rights and options for tribes and extend the responsibilities to the Bureau. While many of the principles have been part of Bureau policy in the past, the Act and Regulations reaffirm them and give them the force of law. The discussion below presents these principles along with citations to the specific parts of the Regulations on which they are based.

Key Principle #1

* The Tribal Governing Body is the sole authority for the tribe in in regard to Title I of the Self-Determination Act. No tribal organization may use the provisions of the Act unless specifically authorized to do so by the governing body of the tribe 1/.

The Regulations specifically state that the governing body is the sole spokesman for the tribe on Indian Self-Determination matters. This reinforces tribal sovereignty and eliminates the problems of conflicting voices speaking on behalf of a tribe. Only tribal governments are eligible for Self-Determination grants [§ 272.11]. No contracts can be entered into or personnel assignments made by the Bureau to tribal organizations under the Act until specifically authorized to do so by a resolution of the tribal governing body 1/ [§ 271.18]. This principle will enable a tribal government to implement an orderly and rational approach to its use of contracting and the other tools of the Regulations.

Key Principle #2

* The Act and the Regulations impose no compulsory requirements on tribes to use the tools provided by the Regulations or to establish "Self-Determination" programs.

Tribes are not required now, or at any time in the future, to contract any or all of the Bureau's programs. Nor can a tribe be penalized if it does not contract. Furthermore, there is no requirement for tribes to present the Bureau with a Self-Determination Plan, or other evidence of how they will eventually assume responsibility for services the Bureau is now providing. "Self-Determination" includes the right to retain Bureau services just as they are now.

Section 271.1 of the Regulations states: "Nothing is these Regulations shall be construed to mandate a tribe to apply for a contract or contracts with the Bureau to plan, conduct and administer all or parts of any Bureau program. Such applications under these Regulations are strictly voluntary."

This same principle also applies to the other tools made available by Regulations; the tools are available for tribes to use when the tribe believes the tools would be useful to them. If and when they use them is a tribal decision; the Bureau will not interfere in that decision, but will accept and support it.

1/ Except the assignment of Federal personnel under the IPA.

Key Principle #3

* The Indian Self-Determination Act is not a panacea in and of itself; it does not solve all the problems of Indian tribes and people. The Act and Regulations do, however, provide tribes with four flexible and innovative tools to help them respond to their own critical needs and priorities. Rigid requirements are avoided, permitting tribes to adapt the tools to their own unique situation.

Four basic tools provided by the Act and Regulations are:

1. Grants to Tribal Governing Bodies

The Bureau may make grants for a variety of purposes--strengthening tribal government; preparing for contracting; planning and monitoring of Federal programs; providing matching share for other Federal and non-Federal grants; and related purposes under these general categories.

2. Contracting of Bureau Programs

While tribes have been contracting Bureau programs for a number of years, the Act and Regulations define the contracting process more clearly by establishing the authority, procedures, rights and responsibilities for both the tribes and the Bureau.

The Regulations also provide tribes greater flexibility in using the contracting tools. Tribes may contract an entire program, a portion of a program, or a program the Bureau is authorized to provide but is not presently providing. When a tribe applies to contract a program it may redesign the program to better meet tribal or village needs. The redesigned program does not have to conform with restrictions imposed on Bureau programs by the Bureau manual [§ 271.15(d)]. A tribe may also request a waiver of Bureau program regulations where it feels that those regulations limit its ability to effectively operate a program [§ 271.15(e)].

3. Planning and Designing Programs that the Bureau Continues to Operate

The Regulations authorize tribes to develop plans to redesign or restructure Bureau programs excluding any trust resources program. The Bureau is then required to operate that program under the tribal plan, so long as the plan meets certain general Bureau requirements. This tool permits tribes to influence the way a Bureau program is run without assuming the direct administrative responsibility which would be required in contracting. Tribal planning of Bureau programs is not a separate section of the Regulations themselves (it is included in the Grant Regulations, § 272.27); however, it is an independent concept, and a tool of sufficient importance to justify separate treatment, see Chapter II, Section C of this Handbook.

4. Personnel Options

The Regulations enable tribes to make use of Federal personnel to help tribes carry out their priorities. They may directly hire Federal employees to work for the tribe and allow the employees to retain certain Federal fringe benefits. Tribes are, for the first time, eligible to use the benefits of the Intergovernmental Personnel Act (IPA). They may also direct the activities of Bureau personnel under the 1834 Act (25 U.S.C. 48).

These tools are clearly not the answer to all problems facing tribes. In particular, Title I of the Act does not authorize or provide new funds for the expansion of existing Bureau programs or the addition of new ones. The tools do, however, afford tribes the mechanisms to get more services from existing funds. Since funding will always be less than is desired, these tools are especially important.

When tribes, on their own initiative, decide to use these tools, they should remember that the Regulations have been written to give them room for flexibility and creativity. Before tribes use any of these tools, they may wish to consider variations and adaptations permissible under the Regulations in order to insure the development of most effective and appropriate approach to meet as their needs.

Key Principle #4

* The Burden of proof for turning down a contract application is on the Bureau. When a tribal organization approved by resolution of the tribal governing body submits a contract application, the Bureau must approve the application unless the Bureau can demonstrate by substantial evidence that specific grounds exists for declining to do so.

The Act directs the Bureau to contract when requested to do so by a tribe--except when the application does not satisfy specific and limited declination criteria listed in the Act. The Regulations have strengthened this concept by placing the burden of proof for declination (refusal by the Bureau to contract a program) on the Bureau. Not only are there limited reasons for which the Bureau can decline a contract application, but the Bureau must prove that one of those reasons exists. Therefore, the presumption is that the application should be approved. Because some positive presumptions on behalf of the tribe are contained in the declination provisions, tribal applications should be approved in most cases.

Key Principle #5

* The Act and Regulations mandates fundamental, new or expanded responsibilities and missions for the Bureau.

The Act does not impose any new priorities on tribes. The Act does, however, mandate fundamental changes in the Bureau's role and mission. The changes do not decrease Bureau responsibilities but specifically define the new or expanded roles the Bureau must perform under self-determination: to provide technical assistance to tribes, to assist tribes to obtain assistance from Federal and State agencies upon tribal request, and to monitor Self-Determination contracts and grants. These roles complement the Bureau's traditional role of providing direct services to tribal members.

The Regulations require that the Bureau provide technical assistance at various points in time in the contracting and grant process, in preparing contract applications, when applications are declined, when contracted programs run into trouble, when seeking grants from other Federal agencies, and at various other points. The Bureau has been performing these functions on an on-going basis, but the Regulations make the tribes entitled to them as a matter of law.

The Bureau continues to have the legal obligation, to Congress and to the Indian people, for monitoring the contracts and grants it makes to tribes and tribal organizations. It will do so in a way that fully meets this responsibility—without violating the spirit of self-determination.

In addition to these specific responsibilities, the Bureau will be developing its capability to assist tribes in their overall effort to accomplish their priorities—in strengthening their tribal governments, developing new approaches to programs and services, in running programs tribes have contracted from the Bureau, and any other effort tribes have chosen. As a start, the Bureau has created an Indian Self-Determination Staff in the Office of the Commissioner to advise him on the implementation of the Self-Determination policy. It has also created a Division of Self-Determination Services in the Office of Indian Services to coordinate the Bureau's training, technical assistance and grant activities under the Self-Determination Act and Regulations.

Key Principle #6

* The Act and Regulations reaffirm the Federal Government's unique relationship with and responsibility to the Indian people.

The Congress and the Bureau have provided as much protection as possible to insure that the Indian Self-Determination Act will not erode the special relationship that now exists between the Federal Government and Indian tribes.

- o In the Preamble to the Act, Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people.

- o The Regulations for grants and contracts both begin by stating that "nothing in these Regulations shall be construed as authorizing or requiring the termination of any trust responsibility of the United States with respect to Indian people, or permitting significant reduction in services to Indian people as a result of this part."

- o The Regulations guarantee the right of retrocession by providing for an authorized position-ceiling reserve to assure that Bureau staff will be available if a tribe decides to retrocede a program it has contracted or if the Bureau has to reassume operations of a contracted program.

These provisions assure, to the extent possible, that use of the contracting or other Self-Determination tools will not lead to a weakening of the special relationship which the Federal Government has towards Indian tribes.

CHAPTER II

ANALYSIS OF THE TITLE I SELF-DETERMINATION REGULATIONS

This Chapter provides an in-depth analysis of the Title I Regulations, broken out into four sections--Grants, Contracts, Tribal Planning of Bureau Programs, and Personnel.

In each of the four sections, the major regulatory provisions are explained and the rights, responsibilities, and options they offer to tribes are discussed. The sections are organized to present the Regulations from a policy perspective--the way tribal leaders would approach them when developing tribal policy on self-determination tools. For example, the Contracts section begins with, "what may be contracted," "who may contract," and "how do we contract." Therefore the discussion does not always follow the precise sequence in which the provisions appear in the Regulations.

A. GRANTS UNDER THE SELF-DETERMINATION ACT. [Section 104 (a) and (c) of the Act; 25 CFR 272 of the Regulations]

Section 104 of the Act authorizes the Bureau to make grants to tribal governments. Under the Grant Regulations [Part 272], the purposes for which tribes can use their grant funds are broad: to improve their governing capabilities, to prepare for contracting of Bureau programs, to enable them to provide direction to the Bureau, and to have input to other Federal programs intended to serve Indian people.

Under the Act, the making of grants to tribes is discretionary with the Secretary and subject to the amount of funds made available for this purpose. However, within the level of funds made available the Bureau will allocate funds on a formula basis. Each Federally-recognized tribe may apply for its share of these formula grant funds. A tribe still must submit an acceptable grant application to obtain its grant funds; however, that application will not be competing against applications from other tribes. Instead, the tribal governing body will be applying to secure the portion of funds specifically earmarked for that tribe.

1. Purposes of Self-Determination Grants

The areas in which a tribe may use its grant funds are discussed below. As tribal leaders examine these various options, they should keep in mind that grant funds will be limited; they will never meet all tribal needs. Therefore, Tribal leaders may wish to begin to establish priorities for the use of their grant funds from among the many optional uses offered by the Regulations.

a. Strengthening Tribal Government [§ 271.12(a)]

A tribe may apply for grant funds to be used to strengthen and improve the institutions of tribal government--to improve its financial management system, strengthen its court system, revise its administrative management structure, rewrite its constitution or code, train existing tribal staff and tribal decision-makers, provide technical support and advice to the tribal council, and carry out other related activities. Grants may also be used to improve tribally-funded programs and to construct, maintain or improve tribal facilities or resources.

Grants do not have to be used in conjunction with tribal plans to contract Bureau programs. The strengthening of tribal government is a specific goal of the Act, whether or not a tribe intends to contract Bureau programs.

b. Facilitating Contracting [§ 272.12(b)]

Grants may also be used by tribes to prepare for the contracting of Bureau programs. There are a number of preparatory steps a tribe might want to take before it takes over a Bureau program.

A tribe could evaluate the programs and services presently being provided by the Bureau to determine if the tribe should contract; eg. whether the tribe can improve the services now available if it contracts the program, given the funding constraints. If it decides to contract, it could use its grant funds to develop a plan for a redesigned program to be contracted so it will meet tribal needs more effectively.

Furthermore, since the transition of a program from Bureau to tribal operation is a major undertaking, a tribe could use grant funds to facilitate the transition. For example, it could use the funds to train tribal personnel to operate the contracted program, to prepare accounting, personnel, or property management systems for the contracted program, or to develop a plan to coordinate the contracted program with programs the tribe is already operating.

c. Acquisition of Land [§ 272.12(c)]

The Regulations also authorize tribes to acquire land if the acquisition is related to developing the tribal government or preparing to contract a Bureau program.

d. Influencing other Federal Programs Serving the Tribe [§ 272.12(d)]

A tribe may apply for a grant to plan, design, monitor or evaluate any Federal program that is serving or should be serving its members. All Federal agencies, not just the Bureau and the Indian Health Service, are included here. For example, a tribe could use grant funds to evaluate the adequacy of services to tribal elderly under the different Federal programs for older Americans. If the services are found to be inadequate, the tribe may use grant funds to design a more suitable program and use the design to negotiate with appropriate Federal agencies for additional funds.

e. Matching Share Provision [§ 272.33]

Under the Regulations grant funds may be used to pay for the legally required local share (matching share) for any Federal, or non-Federal, including private, program which contributes to the purposes of the grants program. It offers tribes the opportunity to multiply significantly the funds available to them under the self-determination grant by using the funds as matching shares for grants from Federal agencies, e.g., Departments of Health, Education, and Welfare, Housing and Urban Development; state agencies; or private foundations.

The Regulations [§ 272.33(b)] also state that upon tribal request the Bureau officials will assist tribes to develop applications to other Federal agencies to take advantage of the matching share provisions of this section.

2. Eligibility for Grants [§ 272.11]

Only governing bodies of Indian tribes are eligible to apply for self-determination grants. Tribal governing bodies may, however, make subgrants, or enter into subcontracts with tribal organizations and other groups to perform specific tasks related to the self-determination grant.

3. Requirements of the Grant Application [§ 272.14]

The requirements of the grant application have been kept to a minimum to simplify the task of proposal development for tribes. The application requires a program narrative statement, a budget, and basic administrative information.

4. Criteria for Approval of the Grant Application [§ 272.5]

The basic criteria for Bureau approval of the grant application is that the application set forth a direct and reasonable relationship between the applicant's proposal and the purposes of the self-determination grants program as set out in the Act and Regulations. It is the responsibility of the tribal governing body to establish that such a grant "will improve the tribe's governing capabilities, enhance the tribe's ability to administer Federal programs under contract, or enable the tribe to provide direction to Bureau programs and other Federal programs serving it." Finally, an emphasis on planning and training in the grant application is encouraged.

5. Assistance in the Development of Grant Applications [§ 272.15]

a. Technical Assistance

Bureau personnel will be available at tribal request to provide technical assistance to tribal governing bodies in the development of their plans for the use of self-determinsation grant funds. In addition, to that extent that funds are available, the Bureau may provide technical assistance through outside organizations.

b. Initial Grants for the Preparation of Grant Applications

To assist tribes to work out their self-determination grant priorities before seeking their full share of grant funds and to support the costs of proposal preparation, the Regulations authorize the Bureau to make small initial planning grants to tribes to assist them in preparing their grant applications or to enable them to purchase technical assistance to help them do so.

To obtain a grant, a tribe need only send a letter to the Area Director or the Commissioner (depending on whether the grant is limited to a single Bureau Area or involves more than one Area), stating the purposes and objectives of the initial planning grant and including a budget for it. If the tribe so desires, it may use the regular grant application form to request its initial planning grant. A tribe may receive ten (10) percent of the total funds that would be available to it, up to a maximum of $20,000, under the initial planning grant.

6. The Grant Application Review Process

Authority to approve or disapprove a grant application resides with the Area Director for grants to tribal government bodies within the Area and with the Commissioner where more than one Area is involved. Since most grants will be approved by an Area Director, the review process for that situation has been described below.

a. Review and Recommendation by the Agency Superintendent [§ 272.18]

Within a period of thirty (30) days, the Agency Superintendent must review the grant application and recommend approval or disapproval to the Area Director. The Superintendent must inform the tribe in writing of any problems which may cause him to recommend disapproval and offer technical assistance to overcome the problems. However, the tribal governing body may choose not to accept the technical assistance. Even if the problems indentified by the Agency Superintendent are not resolved, his recommendation must be forwarded within a period of thirty (30) days to the Area Director. This time period may be extended only with the written permission of the applicant tribal governing body.

b. Area Office Review and Action [§ 272.21]

Upon receiving the recommendation of the Agency Superintendent, the Area Director must act on the application within thirty (30) days. If the Area Director approves the grant, the tribe shall be so informed and funds made available as soon as possible. If the Area Director disapproves the application, he must provide the applicant tribal governing body with a statement specifically stating the reasons for disapproval.

c. Appeals for Disapproval Actions [§ 272.53]

The decision of the Area Director to disapprove a grant application may be appealed by the tribe to the Commissioner pursuant to 25 CFR, Part 2, the standard Bureau procedure for appeals.

7. Administrative Requirements for Self-Determination Grants

The administrative requirements for the grants program as set out in Part 276 of the Regulations are based substantially on existing standard Federal requirements. Certain unique provisions have been added to reflect the special circumstances faced by Indian tribes. Thus, most tribes that are already receiving grants from any Federal agency will not be required to meet any new standards for the Bureau's grant program. For tribes with no prior experience with Federal grants, the self-determination grant guidelines will further clarify the provisions of Part 276.

B. CONTRACTING UNDER THE SELF-DETERMINATION ACT

Contracting is the legal device Congress chose to enable tribes to operate Bureau programs. While contracting for this purpose is not new, the Act makes contracting easier and more flexible for tribes to use. However, the Act does not require tribes to contract nor will a tribe be penalized if it does not contract.

Of all the tools provided by the Self-Determination Act, contracting gives a tribe the most complete control over the programs now run by the Bureau. That control has numerous advantages for a tribe. On the other hand, it involves the most responsibilities and risks for tribal governments. Therefore, contracting should be viewed as another program tool; one that tribes can use when it will help them achieve objectives and one they may not want to use when the disadvantages of using it outweigh the benefits.

One point that should be kept clearly in mind is that Title I of the Act provides no new funds beyond what is presently appropriated to enable tribes to expand or improve programs when they contract.

This section analyzes the contracting regulations with emphasis on rights, responsibilities, and program options they offer tribes. Section B of Chapter III, of this Handbook discusses some things tribes might want to consider in deciding whether and when to contract Bureau programs.

1. Which Bureau Programs May be Contracted [§ 271.12]

The Regulations gives tribes broad latitude and flexibility as to the kinds of programs they can contract.

a. A Tribe Can Contract For Any Existing Bureau Programs

This includes BIA credit programs and certain trust programs (§ 271.32 lists the contractible trust programs), as well as the standard service programs—education, social services, law enforcement, and so forth. The tribe may operate the contracted program under the plan and policy the Bureau had used previously or it can redesign the program if it feels that doing so would better meet tribal needs. When redesigning a program, a tribal organization is not bound by the Bureau manual. The only reason the Bureau can decline a new plan is if it fails to meet the declination criteria [§ 271.15). The fact that the tribal plan is inconsistent with the Bureau manual is not, by itself, grounds for declining to contract. Where the tribal plan conflicts with Bureau program Regulations (those contained in 25 CFR), the tribal organization may request a waiver of such regulations from the Commissioner under the procedures set forth in § 271.15(d).

b. A Tribe Can Contract For A Portion Of A Bureau Program [§ 271.12(a)]

There may be many situations in which the contracting of a portion of a program, rather than the entire program, could be considered. For example, a tribe may want to get some experience running a portion of a program before it takes on responsibility for the entire program. There may be other situations in which contracting just a portion of a program will enable the tribe to accomplish its goals without requiring the tribe to contract the rest of the program. Contracting a portion of a program gives tribes a way of addressing those specific areas it is concerned about.

There are certain limitations on contracting portions of programs. One of the most important is money. In certain cases there may not be enough funds available for a tribe to run a separate tribal program. (See the discussion below on the amount of funds a tribe is entitled to when it contracts.) A major limitation on contracting a portion of a program is that the portion must be functionally divisible from the remainder of the program. Furthermore, a single employee position can be contracted only when the employee provides a direct service to the Indian people, and that position represents a divisible portion of the program.

c. A Tribe Can Contract For Programs the Bureau is Authorized to Provide, But Is Not Now Providing Due to Funding Limitations [§ 271.12 (c)]

The Bureau's authorizing statutes are broad and cover a vast range of programs which the Bureau could legally provide. Because funding is limited, the Bureau, Congress and the tribes have had to set priorities; therefore the Bureau is actually operating a lesser number of the possible programs than are authorized. The Act permits tribes to contract any program the Bureau is authorized to provide, not just those it is actually operating.

However, Title I of the Act does not provide funding for the creation of new programs. Therefore, if a tribe wants to contract for a program the Bureau is authorized to provide but is not now providing, it will have to decide which of its presently operating Bureau programs it wants to cut or eliminate completely, and then request that the Bureau reprogram the funds to the "authorized" program the tribe wants to establish and operate through contracting. The Bureau will carry out the reprogramming to the extent possible within the limitations imposed upon it by the budget process. Tribes, thus have an opportunity to readjust program priorities and create certain programs by reducing or eliminating others.

For example, a tribe might decide to contract for a recreation program for its young people. If the Bureau was not now providing such a program, the tribe would have to decide which of its other Bureau programs it would be willing to have reduced to obtain funds for the recreation program. But once a reprogramming of funds is accomplished by the Bureau, the tribe could apply to contract any operating Bureau program.

Some tribes may not now have an education, employment assistance, or other Bureau program. Using this provision the tribe could request reprogramming of funds to create such a program.

2. What Funds Are Available As Part of the Contract

The authority to contract is useful to the extent that adequate funds are made available to the tribe to operate the contract. The Regulations define the funds to which tribes are legally entitled, what additional funds may be available for the contract, and how the specific amount of funds for each contract will be determined.

The funds to which tribes are entitled for a contract includes:

- o Funds the Bureau would have otherwise provided for direct operation of the program if it was not contracted.
- o Overhead funds (Indirect costs).

Additional funds may be available from:

- o Funds which have been reprogrammed by the Bureau at tribal request from other operating Bureau programs serving the tribe.
- o Funds appropriated for the additional costs of contracting.

There is no money provided in Title I of the Act to expand the total services the Bureau is now providing or to pay for additional programs.

a. The Amount the Secretary Would Have Otherwise Provided (Direct Cost)

Section 106(h) of the Act provides that "the amount of funds provided under the terms of contracts...shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs of portions thereof for the period covered by the contract." The Regulations [§ 271.54] define this amount as those funds that would have been available at the agency level. (If the program was operated directly by the Area Office, it is the amount of funds available at the Area Office.)

Under § 272.16(a) a tribe entitled to ask the Bureau, at any time, how much it would be entitled to if it contracted a particular program, or a portion thereof. Tribes are encouraged to request this information before they begin developing a contract application so that they can plan the contracted program within available resources.

b. Overhead (Indirect Costs)

The funds described in the previous section are designed to cover only the direct costs of operating programs. The contractor is also entitled to funds for auditable overhead. (A list of standards for determining allowable overhead costs is found in Appendix A of Part 276.) The Bureau now has a separate budget item for overhead costs (Indian Contract Support). Therefore to the extent possible within available appropriations, the funds for overhead costs are in addition to the amount of funds the Secretary would have otherwise provided.

c. Reprogramming of Bureau Funds

A tribe may supplement funds for contracting by requesting reprogramming of funds from other Bureau programs provided to that tribe. Within the Bureau's present programming authority it will honor such requests. Reprogrammed funds can be used to meet some of the additional costs of contracting, to expand contract programs, or to run programs the Bureau is not now providing. Since reprogramming means a reduction in funds and services to some programs, the sole authority to request reprogramming lies with the tribal governing body. Tribes may also increase funds available for contracting a particular program, as part of the priority setting or "Band Analysis" process.

d. Funds for the Additional Costs of Contracting

In many cases contracting will increase direct program costs, even if the program itself is not expanded. This applies particularly to contracting of portions of programs and to tribes in multi-tribal agencies, where a program serves several tribes, and one of those tribes wants to contract its portion of those services.

Where a tribe wants to contract a portion of a Bureau program, the amount of money the Bureau has spent on the portion of the program the tribe wants to contract (and therefore, the amount of the tribe is entitled to when it contracts) may not be sufficient for the tribe to run that portion as an independent program. For example, there may not be enough funds to hire even one full-time staff person.

In agencies serving more than one tribe, the costs of running two similar programs—one by the contracting tribe and one by the Bureau to serve the non-contracting tribes—will clearly be greater than the costs required to run the single program.

The Bureau is seeking additional appropriations to meet these additional costs of contracting. The absence of additional funds to cover these additional direct costs will impose severe constraints of contracting.

If no additional funds are available to cover these added programatic (direct) costs, a tribe has several alternatives open to it:

- o It can supplement the budget of the contracted program portion with tribal funds or operate it in conjunction with an on-going tribal program. For example, the employment assistance program could be operated in conjunction with the CETA program.

- o It can ask the Bureau to reduce the amount of money going to the part of the program it did not contract and add it on to the contracted program, i.e., reprogram. Although this might reduce the total amount of services the non-contracted part of the program is able to render, a tribe can decide that the trade-off is worth it and request the Bureau to follow its recommendation [§ 271.55 (g)]. This alternative could not be used in a multi-tribal agency situation, if reducing the level of the non-contracted part of a program would also reduce services to other tribes which are served by the program--unless all tribes involved agreed to the reduction.

3. Eligibility to Apply for a Contract

To be eligible for a contract under P.L. 93-638 an organization must be a tribal organization as defined in the Regulations [§ 271.2(a)] and must be authorized to apply for that contract through a formal "request" or resolution by the governing body(ies) of the Tribe(s) to be served by the contract [§ 271.18]. Each of these eligibility requirements is discussed further below.

The Regulations define tribal organization to include:

- o The recognized tribal governing body of the tribe.

- o Legally established organizations of Indians or tribes that are controlled, sanctioned, or chartered by such governing body or bodies (for example, a tribal utility company) or which is democratically elected by the adult members of the Indian community to be served by such organization (for example, an Indian Education Committee seeking to contract the JOM program in its school).

Thus, in many cases the tribal organization will be the tribal government itself. But in others it may be a non-government tribal organization authorized by the tribal government to perform the job. In no cases can the contractor be a non-tribal organization

though a tribe can take the contract itself and then subcontract part of the program to such an organization. A tribe will have to decide on a case-by-case basis which kind of organization is most appropriate for contracting a particular program.

The second requirement is that the tribal organization must receive authorization from the tribal government in the form of a resolution from the tribal governing body before it may submit its application to the Bureau.

The tribal resolution must contain specific information according to § 271.18 of the Regulations. (See Figure 1 on page 22 for a detailed list of elements to be included in the tribal resolution). If the proposed contract covers services to more than one tribe, the tribal organization must get a resolution from each of the tribal governments to be served. Where the requirements concerning the form of the resolution as described in the Regulations are inconsistent with the tribe's organic documents or in the absence of such documents, tribal practice, shall take precedence.

The requirement of having a tribal resolution gives the tribal government control over which programs will be contracted on its reservation and which tribal organizations will operate the contract. This permits tribal governments to develop and implement an orderly and rational approach to contracting.

The tribal resolution authorizing the contract application is also the tribal governing body's opportunity to define how large a role it wishes to play in the contract application process and the operation of the program. The options available are particularly important when the tribal organization is not part of the tribal government and has no formal relationship to it, since it provides a mechanism for the tribe's maintaining the accountability of the tribal organization to the tribe.

For example, the Regulations do not say that the tribal government has a automatic right to review the contract before it is signed by the Bureau and the tribal organization. If a tribal government wants to review and/or approve the proposed contract at this point, it must so indicate in its resolution.

In addition the tribal governing body may use the tribal resolution to define its role vis-a-vis the tribal organization with regard to the following issues: access to Bureau records, recontracting, appeals of a decision of the Commissioner, contract amendments, retrocession, and appeals under § 271.82, § 271.83, and § 271.84.

While the Regulations set out procedures on how the tribal organization and tribal governing body shall relate on the above issues a tribal government has a right to modify these procedures to make them compatible with the tribe's way of doing business. If a tribe does not set forth different procedure in its authorizing resolution, it is bound by the procedures in the Regulations.

The tribe may not, however, change the way the tribal organization relates to the Bureau. For example, § 271.20 requires a tribal organization to submit proposals to recontract at least 120 days before the existing contract expires. Under the Regulations, of those 120 days, the tribal governing body gets 45 days to review the proposal; the Bureau then gets 75 days to process the proposal. If the tribe feels that 45 days is too short a period in which to complete its review, it can, for example, require the tribal organization to submit the proposal to it 150 days before the existing contract expires. It may not, however, reduce the 75 day period allotted to the Bureau for its review.

Tribes are encouraged to develop a standard format for their resolutions taking these options into consideration so that they do not have to start from scratch every time they are asked to pass an authorizing resolution.

Figure 1

CONTENTS OF TRIBAL RESOLUTION [§ 271.18]

When Tribal Organization is the Tribal Governing Body

1. A brief statement of the contract scope.
2. The tribal official authorized to negotiate the contract and any amendments thereto.
3. The tribal official authorized to execute the contract and any amendments thereof.
4. The expiration date of the authorities granted by the resolution.
5. The extent and procedure, if any, for review of the contract and any amendments thereto by the tribal governing body before execution.
6. The proposed date for contract commencement.
7. The proposed term of the contract.

When Tribal Organization is NOT the Tribal Governing Body

1. The name of the tribal organization.
2. A brief statement of the contract scope.
3. The extent and procedure for review by the tribal governing body of the contract and any amendments thereto prior to execution by the tribal organization.
4. The tribal office or official to which the Bureau should send copies of contract documents and correspondence.
5. The proposed term of the contract.
6. The proposed date for contract application.
7. Any limitations on authorities granted the tribal organization, including authorities granted to or vested in the tribal organization and/or tribal governing body in regard to:
   a. Access to Bureau records under § 271.16.
   b. Recontracting under § 271.20.
   c. Appeals of a decision of the Commissioner under § 271.26.
   d. Requests to revise or amend a contract under §§ 271.61 and .62.
   e. Request for contract retrocession under § 271.71 and .72.
   f. Right to appeal under § 271.82, § 271.83 or § 271.84.

4. Requirements of the Contract Application [§ 271.14]

A tribal organization applying for a contract must submit a contract application (plus the authorizing request from the tribal governing body). There is no specific form required for the application. The documents submitted must contain the information asked for in the Regulations. The Regulations make clear that preparation of the application should not impose undue burdens on the tribal organization. The application need only contain the minimum information necessary to enable the Bureau to carry out its legal obligations. The application requirements also are explicitly stated so that tribal organization will not have to guess at what is expected.

In addition to some administrative information describing the contractor, the application asks for the following kinds of information:

a. A description of how the program will operate once it is contracted: the plan of operation; the goal and objectives; evaluation plans; the budget; the equipment that will be used; staffing plan including intent to utilize Bureau employees, if any, etc.

b. Information that addresses the specific grounds on which the Bureau can decline (refuse) to contract: certification that the tribal organization has or will establish an adequate bookkeeping and accounting system; a description of the personnel system to be used, etc. Persons preparing contract applications should refer to the section of the Regulations on declination [§ 271.15], as well as the section on contract application requirements. (In Figure 2, on pages 25 and 26, the contents of the contract application are listed.)

There is a requirement for an acceptable bookkeeping and accounting system. The criteria for declination related to bookkeeping [§ 271.15 (c)(2)] states that the Bureau must demonstrate that the tribal organization does not have, or cannot set in place using the contract funds an accounting and bookkeeping system which will be adequate. To assure that the Bureau cannot demonstrate this, the tribal organization need only follow the procedures described in the application requirements. That is, if the tribal organization has an existing bookkeeping and accounting system, it would only have to obtain a certificate from a licensed accountant that the system meets standards set forth in Appendix B of Part 276 of the Regulations. If it does not have such a system, it does not have to set one up at the time of the application but must agree, in the application, to establish such a system and have it certified by a licensed accountant before any funds are disbursed under the contract.

Other parts of the contract application (and declination criteria) requirements are also designed to postpone the costs of setting up systems and structures for the contract until after the contract is signed or is operative. This approach minimizes the burden of applying for a contract and is in keeping with the presumption that contracting is a right of a tribe.

The application section also requests certain information which will facilitate implementation of the contract if it is approved. For example, it asks, as part of the budgetary information, for the amount of advance payment the tribal organization will need. This procedure is intended to permit the Bureau to get started on the paper work for the advance as soon as possible.

The application also asks for a staffing plan including information on how that plan will utilize Bureau personnel presently working in the program to be contracted. In situations where all the Bureau personnel working in the contracted program are not utilized by the tribal organization, the Bureau must have 120 days from the date of the contract application to carry out reassignments or reduction-in-force if necessary. This means that contracts which require reassignment of Bureau personnel probably cannot commence until 120 days after the application has been received.

Figure 2

CONTENTS OF CONTRACT APPLICATION [§ 271.14]

1. Full name, address and telephone number of the tribal organization which is applying for the contract.

2. Full name of tribe(s) with which the tribal organization is affiliated.

3. Full name of tribe(s) directly benefiting or receiving services from the proposed contract.

4. Documentation of the tribal request to contract as required in § 271.18.

5. Date of submission to the Bureau and the name of the office where the application was submitted.

6. Signature by the authorized representative of the tribal organization and the date thereof.

7. Estimated number of Indian people who will receive benefits or services from the contract, based on available data including tribal records.

8. Descriptive narrative of what functions, Bureau programs, or portions of programs the tribal organization wants to contract for.

9. Plan of operations, which shall include but is not limited to:

   a. A statement of tribal goals and objectives to be obtained by the contract.

   b. The organization, methods and procedures to be used to accomplish the tribal goals and objectives.

   c. The means to measure progress and accomplishment.

   d. The budget showing the amount and sources of funding and other resources required for the contract.

   e. Staffing plan, including extent, if any, that Bureau personnel may be utilized. (See Part 275 of this chapter for staffing options the applicant may wish to consider.)

   f. The evaluation criteria and control systems the tribal organization will use to assure that the quality and quantity of actual performance conform to the requirements of the plan.

10. Statement of tribal organization's substantive knowledge of the program, part of a program or functions to be contracted.

11. Description of personnel system and position descriptions for key personnel.

12. Listing of equipment, facilities, and buildings needed to carry out the contract and how the tribal organization intends to obtain them.

(Continued on next page)

Figure 2 (Continued)

13. Certification by a licensed accountant that the bookkeeping and accounting procedures the tribal organization presently uses meet the standards of Appendix B of Part 276 of this chapter. In place of the certification, the tribal organization may submit a written agreement to establish a bookkeeping and accounting system that meets the standards of Appendix B of Part 276 of this chapter and to have the bookkeeping and accounting system certified before the Bureau disburses any funds under a contract awarded as a result of the application. When a certification has been submitted in connection with a previous application, the applicant may state this fact instead of submitting a new certification.

14. Proposed system for managing property and keeping records or agreement to establish within 90 days of contract execution, a satisfactory system for managing property and keeping records.

15. Advance payment required by the tribal organization for contract.

16. Term of contract requested and proposed starting date of contract.

5. Assistance Available to Tribal Organizations in the Development of Contract Application and During the Application Review Process

The Regulations [§ 271.17] guarantee tribal organizations the right to technical assistance in preparing contract applications. Technical assistance is available from Bureau staff, and possibly from additional outside sources. The tribal organization also has a right to Bureau technical assistance at each stage in the application review process in order to resolve any problems raised by Bureau staff which might lead to declination of the contract. The availability of technical assistance from the Bureau is intended to assist a tribal organization, to the maximum extent possible, to avoid declination and to prepare an effective contract application.

The Regulations [§ 271.16) guarantee tribal access to information in the possession of the Bureau which might be useful during preparation of the application, during the application review process, or during administration of the contract. Information includes budget data, staffing information, program plans of operation, etc. The Regulations set out specific procedures for obtaining that information. The only information that cannot be made available would be that which is subject to the limits of the Freedom of Information and Privacy Acts, which legally restrict disclosure of certain information.

Requesting technical assistance or information does not obligate a tribal organization to follow-up with a contract application. After reviewing the information or receiving the technical assistance, it is the tribe's right to decide that contracting for that program is inappropriate or untimely.

6. Criteria for the Bureau's Declining to Contract [§ 271.15]

The declination criteria have been developed to reflect the fact that the Act "directs" the Secretary of Interior to contract, unless specific factors exist which justify his declining to do so. Thus the Regulations state that "the burden of proof is on the Commissioner to demonstrate, through substantial evidence, that one of the specific grounds for declination exists and that, therefore, the application must be declined." This changes the contracting relationship between the Bureau and the tribes, and clearly recognizes that tribes have the right to contract unless one of those specific conditions for declining to contract can be shown to exist.

The Regulations also make clear that declination will not occur because of a condition that could be overcome by using resources that will become available once the contract is signed. For example, to prove it has the necessary substantial knowledge of a program, a tribal organization does not have to employ a technical specialist at the time it is applying for a contract; it only needs to agree to hire one after the contract is in place. Nor must it have a property management or recordkeeping system in place in advance, as long as it agrees to set up such a system using the funds provided in the contract.

Beyond these general considerations, the specific criteria for declination have been defined to facilitate tribal contracting in accordance with the intent of the Act. No other grounds, except those specific criteria listed in § 271.15, may be used to decline a contract application. Each of the declination criteria is discussed below:

a. The services to be provided will not be satisfactory.

To prove that the services will not be "satisfactory," the Regulations require the Bureau to prove that the proposed services will be deleterious or harmful to the welfare of the Indian beneficiaries of the services. Rather than substituting its own judgement as to what program is best for the Indian people, the Bureau now can decline a program only if it can substantially demonstrate that the program proposed by the tribal organization will be harmful to the welfare of the Indians to be served.

A program could also be found not "satisfactory" if it is shown that the services will not be delivered in a fair and uniform manner. To prove this the Bureau must show that the tribe has not adequately defined its eligibility criteria, has not indicated that it will develop an adequate individual complaint procedure, or has not complied with certain other requirements set out in § 271.15(b)(1)(ii).

b. Adequate protection of trust resouces is not assured.

Special provisions have been developed to deal with the trust resources issues and are discussed in part 7 of this section of the Handbook.

c. The proposed project or function cannot be properly completed or maintained by the proposed contract.

This includes such factors as whether the budget is adequate to do the work proposed and whether the necessary systems are or will be in place.

d. The application is not within the scope of 271.1(a).

Contracts for profit are not considered within the scope of the Indian Self-Determination Act and are subject to regular procurement regulations but may be negotiated under the terms of the "Buy Indian" Act authority and regulations.

In arriving at its finding on declination, the Bureau must demonstrate that the tribal organization would be deficient in performance under the contract in one of the six specific areas discussed below:

o Equipment, Buildings or Facilities

The Regulations state that the tribal organization can be held only to the same standards for equipment, buildings, and facilities, as the Bureau has or previously had in place. They also require the Bureau to make available to the organization all equipment, buildings and facilities which have been used in the past to run the program. (The only exception would be where doing so would seriously interfere with the Bureau's ability to provide services to Indian people in non-contracted programs. Wherever possible, sharing arrangements should be worked out in such cases.) Therefore, if a tribal organization does nothing more than use the equipment that the Bureau has previously used for that program, it has insured itself against declination. Insofar as this factor is concerned, it may, of course, use any other equipment available to it. Also, it does not need to have the equipment on hand when it submits the application, but can obtain it once the contract is approved using the resources of the contract.

o Bookkeeping and Accounting Procedures

(See the previous discussion of these requirements in the section on application requirements in this chapter, section B.4.)

o Substantive Knowledge of the Program to be Contracted

Under the Act an application can be declined if the tribal organization lacks the necessary knowledge to adequately run the program it is applying for. The Regulations set out several alternative minimum requirements on "substantive knowledge". If a tribal organization meets any one of them, it is insured against declination on this ground.

First, a tribal government does not have to submit any evidence to show it has the requisite knowledge to run a "governmental program," i.e., a program or function which governments generally run, such as social services, education, and road maintenance. Whenever the applicant is a tribal government and the program is a "tribal governmental function" [as defined in 271.2(q)], the applicant is presumed to have substantive knowledge of the program and declination cannot occur on this basis.

Whenever the applicant is not the tribal government or when the program is not a "tribal governmental function" (even if the applicant is the tribal government), the presumption of substantive knowledge does not apply. Instead, the applicant must show it meets any one of the three conditions set out in § 271.15(c)(3). Again, these are only minimum requirements; other satisfactory evidence of substantive knowledge would also be acceptable. The three alternative minimum conditions are:

- The tribal organization has adequately managed a similar program; or
- The tribal organization has, through its knowledge and experience, developed substantive knowledge of the program; or
- The tribal organization has received services such as those to be delivered under the contract and therefore understands the issues of the program and it can secure training in the subject area of the contract to develop its substantive knowledge of the program, at the outset of the contract.

- Community support

The authorizing resolution from the tribal council for the contract is the initial indication of community support. Once that has been obtained, a contract can be declined for lack of community support, only if the Bureau can demonstrate that two conditions exist:

- That the lack of community support will actually result in the tribal organization not being able to provide satisfactory services, adequately protect trust resources, or maintain services.
- That those raising the issue of the lack of community support have exhausted all their tribal remedies by referendum, plebiscite, council review, or any other procedure provided by tribal laws, ordinances, or practices.

Thus, to the extent possible, community support is a tribal issue and one in which the Bureau should have only limited involvement.

- Adequacy of Trained Personnel

A tribal organization is not required to have trained staff on board at the time it submits the application. It can insure its application against declination if it meets one of the two minimum

requirements set out in the Regulations:

- A tribal organization is presumed to have adequately trained personnel if it already has an adequate personnel system in place [as defined by § 271.15(c)(5)(1)] and agrees to use that system to hire staff for the contract;

- If it does not have such a personnel system in place, it can agree to establish such a system once the contract is approved; it must in this case, however, provide in the application job descriptions for the key personnel for the proposed contract.

- Other Necessary Components of Contract Performance

With the exception of the following three additional criteria, no other "necessary components" may be raised as grounds for declination. These three are:

- The personnel system which the tribal organization has or will develop insures equal access to all qualified tribal members;

- The tribal organization agrees to establish an adequate property management system;

- The tribal organization agrees to establish a recordkeeping system which includes, at a minimum, protection of financial records and all records of lasting value including those involving individual rights such as permanent student records and transcripts.

7. Special Requirements for Trust Resources Programs

There has been a great deal of concern over the possible impact of the Self-Determination policy on the protection of Indian trust resources. As a result, a separate sub-part of the regulations has been devoted to trust resources [Sub-part C, § 271.31-34]. The Regulations specifically forbid the Bureau to contract, delegate or terminate any trust responsibility under the Act. They do permit contracting of certain trust activities involving the management of trust activities relating to the management of trust resources, but impose additional protective requirements on such contracts.

The Regulations specify which trust activities may be contracted. They are activities involving natural resources: forestry, range management, wildlife and parks, etc., [§ 271.32]. Programs involving the management of trust funds, or similar programs which would require the delegation or termination of trust responsibilities may not be contracted [§ 271.34(a) and (b)]. Also the responsibility for funds awarded under trust judgments may not be contracted.

The Regulations also impose stricter performance requirements on a proposed contract for trust activities than they impose in other areas. The application must contain detailed information on the impact of the proposed activities on the trust resources, and the special skills and qualifications required of personnel working on the contract. Most important, the regulations provide the Bureau with additional grounds on which to decline such an application [§ 271.34(c) and (d)]:

> "... The Commissioner shall decline to contract if he finds that:
>
> (c) The contract application provides for completion or maintenance of the project or function to a lesser standard than under Bureau administration .....
>
> (d) The proposed activity requires special skills for its performance and the proposed key staff does not meet Civil Service Commission or excepted qualification standards, other accepted professional standards appropriate to the discipline involved, or are not otherwise recognized as technically qualified."

The Regulations reduce the burden of proof the Bureau must meet to decline to contract a trust-related contract. Applications for contracting of trust-related programs, therefore, will be reviewed more closely than other applications.

8. The Application Review Process [§§ 271.22-271.25]

The application review process is built on certain basic principles:

- The Regulations set specific time limits for each Bureau action in the process, but permit the tribal organization as much time as it requests to carry out its responsibilities in the application review process. For example, if the Area Director believes there are grounds to disapprove the application, he must notify the tribal organization and request a meeting with the tribal organization within 15 days of his notice. However, if the tribal organization wants additional time to prepare for the meeting it can have the meeting delayed for as long as it needs.

- The application process is set up to try to avoid declination. It seeks to catch problems early and correct them before any formal decisions to decline are reached. If the Bureau thinks that the application is deficient, in the application review process, at all points it must spell out to the tribal organization the specific problems and must offer technical assistance to correct the deficiencies. The tribal organization does not have to accept the technical assistance, but the Bureau must offer it.

  If there are no problems with the contract application the contract should be signed within 75 days. (As noted earlier however, in any cases involving the displacement of Federal personnel, the contract probably will not commence until 120 days from the time the application is submitted, due to the need for personnel action.) If the tribal organization and the Area Director disagree about an application, the issue could be on the desk of the Commissioner within 75 days from the time it is submitted.

The major steps in the application review process are:

a. Review by the Agency Superintendent [§ 271.22]

When the initial application is submitted to the Agency Superintendent, his responsibility is to review the application and to forward his comments and recommendations to the Area Director and the tribal organizations. Where he feels that specific declination problems exist, he must inform the tribe in writing and offer technical assistance to correct them. He does not have any authority to approve or disapprove the application or to require the tribe to modify the application. Therefore, the tribe may choose not to accept the technical assistance. However, since the Agency Superintendent is likely to be the Bureau official most familiar with the program, his suggestions should be of great value in helping to avoid problems at other levels in the review process, and should enhance the application.

b. Action by the Area Director [§ 271.23]

The Area Director has the authority to approve a contract application. If the Area Director decides not to approve a contract, he shall recommend declination to the Commissioner.

When the Area Director decides that there are no grounds for declining the application, the Area contract officer shall notify the tribal organization of this fact, and within thirty days from that notice, negotiate and award the contract.

If he believes possible grounds for declination exist, the Area Director must offer to meet with the tribal organization to discuss specific issues which have been identified as grounds for declination. In order to facilitate this discussion, the Bureau will state the issues in writing in advance and will provide copies of any documents which were the basis for raising these issues. These meetings, in effect provide the tribal organization and the Bureau with an opportunity to negotiate and eliminate those issues which may cause declination. While the Area Director may make suggestions on the application as a whole, the only formal issues in such discussions are those which constitute possible grounds for declination as set out in § 271.15 (Criteria for Declination).

If the Area Director and tribal or anization cannot resolve the problems, the Area Director prepares a written recommendation to decline and forwards it to the Commissioner and the tribal organization.

c. Review and Action by the Commissioner [§ 271.25]

The Commissioner is the only Bureau official with the authority to decline to enter into a contract with a tribal organization.

Upon following a review of the Area Director's recommendation to decline, the Commissioner may overturn the recommendation and direct that the contract be negotiated and amended within forty-five (45) days. If the Commissioner is in agreement with the recommendation to decline he must give the tribal organization the opportunity to present evidence on its position in writing and hold an informal hearing before taking action. Thus, the tribal organization will have the opportunity to be heard at the highest decision-making level before the decision is actually made. The Commissioner is required to act within sixty (60) days of receiving the recommendation to decline. The Bureau will cover the costs of travel and per diem for representatives of the applicant tribal organization and the tribe involved, if the meeting is to take place more than 50 miles from the offices of the applicant.

d. Appeal of the Commissioner's Decision to Decline

If the Commissioner declines to enter into a contract, the tribe has a right to appeal the decision to the Director, Office of Hearings and Appeal, Department of Interior, Washington, D.C., according to procedures set out in 43 CFR Part 4. The tribe may further appeal the decision of the Director to the Federal Courts.

9. Amending Contracts [§ 271.61-66]

Once a contract is approved and operational a tribal organization may need to revise or amend that contract. The Regulations set out certain procedures for amendment or revision of ongoing contracts. The Bureau must approve the proposed amendment, just as it has to approve the contract application, unless it can prove that one of the specific declination reasons exist for declining the amendment. Therefore the burden is on the Bureau to show why an amendment should not be approved. If it cannot, the amendment must be approved.

The tribe may set forth in its tribal resolution the role it wishes to play in the amendment process for contracts with tribal organizations other than the tribal governing body. If it does not stipulate a process in the resolution, then it)s bound by the provisions of the regulations which allow the tribal governing body 15 days in which to object to any proposed amendments.

Whenever the Bureau chooses to propose an amendment, it must do so in writing to the tribal organization (contractor) concerned, specifying the amendment and the reasons for it. No amendments shall become effective unless they are accepted in writing by the contracting tribal organizations and/or the tribal governing body.

10. Recontracting [§ 271.20]

Once a tribal organization has entered into a contract under these regulations, the tribal organization has right to have the contract renewed annually, without going through the initial application process again. The tribal organization must simply submit a document requesting to recontract the program and include a budget for the proposed term of the contract. The budget, would have to be negotiated between the tribal organization and the Bureau, subject to the availability of appropriated funds.

Where the tribal organization proposes to make any changes in the program operation unde2 the new contract, these changes will be included in its requests to recontract and will be reviewed by the Bureau using the declination criteria. However, simply because the proposed changes may be declined does not alter the tribal organization's right to recontract. In such a case, however, the

tribal organization would have to contract for the program operation as it had been approved in the original contract, unless the declination issues are resolved in its favor.

Effectively then, if the Bureau wishes to discontinue a contract, it must act under the Cancellation for Cause provisions of the regulations [§ 271.75]. It cannot simply refuse to sign a contract renewal.

While the Bureau must recontract with the tribal organizations, the tribal government has a right to veto renewal of the contract. Where the tribal organization is the tribal government, the Bureau assumes that the decision on renewal will be made internally, by the tribal government. Where the tribal organization is not the tribal government, the organization must submit a copy of its recontracting request to the tribal governing body at least 120 days before the original contract expires. The tribal governing body then has 45 days to veto the renewal. If it does not act within that time period, the Bureau will presume tribal government approval to recontract for another year. However, as indicated earlier, the tribal governing body may establish any other procedure for approval for recontracting requests, as long as that procedure is set out in the tribal resolution authorizing the initial contract application. The tribal resolution could, of course, be amended to modify these procedures; or the procedures could be changed when the life of the original resolution ends and a new tribal resolution is required.

11. Contracts in Effect Before December 4, 1975 -- the Effective Date of the Regulations

The implementation of these Regulations will have no immediate effect on contracts for Bureau programs in effect prior to December 4, 1975. Those contracts will continue until their set expiration date. When they expire, however, they must be renewed according to the procedures set forth in the Regulations [§ 271.19].

Requests for renewal of pre-existing contracts which were for services which are now to be contracted under the Self-Determination Act, and which were officially authorized by a tribal resolution which is still in effect, will be treated as if they were Self-Determination Act contracts and the contract will be renewed by the Bureau unless vetoed by the tribal governing body.

However, requests for renewal of pre-existing contracts which were never authorized by tribal resolution, or which were authorized by resolutions which are no longer in effect, will be treated as new contract applications.

Where pre-existing contracts are providing services to more than one tribe, resolutions from all tribes to be served must be in effective or obtained before recontracting may occur.

12. Retrocession

Retrocession gives a tribe the right to return a contracted program to the Bureau at any time and for any reason. Only the tribal governing body may formally decide to turn back a contracted program.

If the tribal organization operating the program is not the tribal governing body, the Regulations provide the tribal organization the right to be heard by the tribal governing body before the governing body makes a decision on retrocession. If the tribal governing body does not wish to provide the tribal organization with the right to a hearing it must state in its resolution accompanying the contract application or any amendment thereto, that it alone has the authority to retrocede a program.

A tribe may chose to retrocede if the program is having serious problems, if the tribe has decided that contracting is no longer appropriate for that tribe, or for any other reason. However, if the tribe is having problems with the contracted program and does not want to retrocede, it has a right to technical assistance from the Bureau to correct any problems the program may be experiencing.

Once a tribe has decided to retrocede, the Bureau has 120 days to take over the program. It is required to take over the program using Bureau personnel and to provide at least the same level of services it provided before the program was contracted.

For those retroceded contracts which are initially entered into on or after December 4, 1975 the Bureau will use the position-ceiling reserve provided for in § 271.77, to restaff the program. There is no position-ceiling reserve available for contracts entered into before December 4, 1975. The position-ceiling reserve will work as follows:

Each time a tribal organization contracts a program, the permanent positions that the Bureau used for that program will be placed in the reserve, since the funds will be given to the tribe under the contract. The positions will remain in the reserve and cannot be removed unless the tribe decides to retrocede the program. Upon retrocession, the Bureau can withdraw the positions from the reserve and hire persons to fill them. Thus there will be positions available to staff a retroceded contract initially entered into after December 4, 1975. This does not mean people will automatically become available, only positions. The Bureau will still have to hire people to fill the positions.

13. Reassumption [§ 271.74]

Reassumption gives the Bureau the right to take back control of a contracted program when the tribal organization has seriously violated its obligations under the contract. The Bureau may reassume if the tribal organizations performance under the contract involves:

- o A pattern or practice of violating the rights of any person. (Isolated violations of rights should be handled through the complaint procedure required of each contracted program and are not grounds for reassumption).

- o The endangerment of health, safety, or welfare of any persons.

- o Gross negligence or mismanagement in the handling of funds provided under the contract.

If the Bureau believes there are grounds for it to reassume a program, it must first give written notice to the tribal organization. The notice must state the reasons for the proposed reassumption, indicate the corrective measures necessary and give the tribal organization 60 days time to take corrective measures. The Area Director must also hold a hearing within 10 days after sending the notice. The hearing will examine whether the grounds stated in the notice of proposed reassumption are valid. If they are found to be valid, the Area Director must offer the tribal organization technical assistance to correct them. The tribal organization also has a right to ask the Commissioner to review the Area Director's decision.

If the Commissioner does not reverse the Area Director upon review of his decision, and if the tribal organization does not correct the problems which have been identified, the Bureau shall terminate the contract and reassume control of the program. The reassumption decision may be appealed under the procedures set out in § 271.82 and .83.

If the Bureau finds there is an immediate threat to safety, it may suspend the contract and reassume control immediately; the notice of corrective steps and the hearing will then follow the reassumption. In all other cases, the Bureau may not reassume until the tribal organization has had an opportunity to take corrective steps or, when requested, until completion of the review by the Commissioner

14. Cancellation for Cause [§ 271.75]

Contracts with a tribal organization may be cancelled for cause when the tribal organization fails to perform within the terms and conditions of the contract. This provision requires contract performance on the part of contractors with the Bureau. The Bureau will

be monitoring performance as part of its legal responsibility for the use of Federal funds.

However, before the Bureau can cancel the contract, it must give the tribal organization and the tribal governing body (if the tribe is not the contractor) notice which includes the following:

- Reasons why cancellation is being considered.

  That the tribal organization has forty-five (45) days to present an acceptable plan to overcome the problems in its contract performance.

If the tribal organization does not submit an acceptable plan within forty-five (45) days of its receipt of the initial cancellation notice, the Area Director may render a decision to cancel the contract, subject to the tribe's right to request a review of the Area Director's decision by the Commissioner within thirty (30) days from the issuance of the cancellation decision. The Area Director's cancellation decision shall state: the reasons for the decision, the actions that must be taken to achieve satisfactory performance, and the technical assistance available from the Bureau. Cancellation will not actually occur until sixty (60) days after the tribal organization has received notice of the cancellation decision.

If the tribal organization requests review by the Commissioner, and the Commissioner's decision favors the tribal organization, the cancellation action shall cease. If the decision goes against the tribal organization, cancellation shall occur at the end of the sixty (60) day period unless the tribal organization has corrected the problems which have been identified.

The final cancellation decision may then be appealed to the Director, Office of Hearings and Appeals, as provided in Subpart G of 43 CFR Part 4.

Three other points which emerge from a cancellation action should be clear:

- When a contract is cancelled for cause, the Bureau will either perform the work with its own personnel or by another contract. In such a case, if the Bureau does not have sufficient forces on hand to immediately perform the work, it may, temporarily contract with a non-tribal organization. Before doing so, however, the Bureau must obtain the advice of the tribe(s) to determine how they desire the services to be rendered.

- If funds are not currently available to maintain the program at its planned level, the cancelled program may be reduced until funds become available for the remainder of the fiscal year, at which time the program will be reassumed at its planned level.

- When a tribal organization has a contract cancelled for cause, it must show that the problems leading to the cancellation have been resolved before it receives another contract to provide the same or similar services.

15. General Contract Requirements Under Self-Determination

The Act authorizes the Secretary of the Interior to waive any provisions of contracting laws or regulations which he determines are inappropriate or inconsistent with the objectives of Self-Determination. The Bureau has already reviewed existing contracting requirements and pre-waived many of them. Those remaining in effect are set out in § 271.41-55 of these Regulations and in 41 CFR 14H-70; no other contracting requirements shall be applied to contracts under the Self-Determination Act. In addition, a tribal organization may request specific waiver of any of the 41 CFR 14H-70 requirements by submitting a request for waiver to the Commissioner under the procedures set out in § 271.51(b).

General contracting requirements include:

a. Advance Payments. The Regulations guarantee a tribal organization a right to advance payments if it requests them. Section 271.41 sets out the procedures for obtaining advance payments. A tribal organization may indicate in its contract application how much advance monies will be needed [§ 271.14(o)]. If the request for an advance payment is included in the application, the Bureau can begin processing the request as soon as the application is approved.

b. Use of Government Property. (See section B.6 of this Handbook Chapter.)

c. Wage and Labor Standards. Section 271.43 of the Regulations requires tribal organizations to comply with the Davis-Bacon Act. (Under Department of Labor rulings this requirement does not apply to tribal governing bodies, or a non-profit Indian organization which a governmental instrumentality, where the work is being performed by the tribe or Indian organization with its own employees.)

d. Indian Preference. Section 271.44 of the Regulations requires tribal organizations to give preference to Indians in employment and training and awards of sub-contracts. A tribal governing body may develop its own Indian preference requirements to the extent that such requirements are not inconsistent with the purpose and intent noted above.

e. Liability and Motor Vehicle Insurance. Section 271.45 of the Regulations requires tribal organizations to obtain public

liability insurance except where the Contracting Officer determines that the risk is minimal in relation to the time and cost involved. However, liability insurance for motor vehicles is an absolute requirement.

f. Recordkeeping. Sections 271.46, 47, and 48 of the Regulations require tribal organizations to keep financial and program records on the contract, and to make those records available to Federal auditors and to the public, subject only to the limitations of the Freedom of Information and Privacy Acts.

g. Reports. Section 271.49 of the Regulations requires tribal organizations to submit annual reports on the contract to the Bureau. It also requires a monthly report by the tribal organization to the Indian people served by the program; the report must give an accounting of how funds have been spent and the purposes for which they have been spent. The report must be made public by posting a public notice or by any other method the Bureau and the tribal contractor agree upon.

h. Penalties. Section 271.50 of the Regulations sets criminal penalties for misuse of contract funds.

i. Term of Contract. Section 271.51 of the Regulations provides that contracts may be written for a period of up to three years where the services to be provided under the contract can reasonably be expected to be continuing in nature, and, when the tribe to be served requests that the term be more than one year [§ 271.52 (a)(2)]. Such contracts may be renegotiated annually to reflect various factors including cost increases beyond the control of the tribal contractor. Proposed changes in program emphasis may also be renegotiated within the general scope of the contract using the contract amendment procedures discussed previously.

j. Savings Under Contract. Section 271.55 of the Regulations states that if the tribal organization does not spend all the money committed to a contract by the Bureau, the savings shall be used to provide additional services or benefits under the contract. Where the savings cannot be spent during the contract year, the savings may be carried over into the next fiscal year's contract, by mutual agreement of the Bureau and the tribe except as otherwise specified by Congress in appropriations acts. The savings shall not reduce the amount of funds the tribal organization would have available to them under the next year's contract had no savings been available.

C. TRIBAL PLANNING FOR BUREAU-OPERATED PROGRAMS [§ 272.27]

Section 272.27 of the Regulations states:

> "Any Bureau program excluding any trust resources programs which is planned, replanned, designed or redesigned by a tribe under a grant provided under this Part, or from any other resource, shall be implemented by the Bureau if requested by the tribe through resolution."

This section of the regulations is a specific effort to implement the policy of P.L. 93-638 where Congress stated that "the Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum participation in the direction of...federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." The Regulations actually go beyond allowing tribes to participate, they require that the Bureau operate programs according to tribally-developed plans.

However, the Regulations set certain requirements tribes must meet to have their plan implemented by the Bureau. These requirements are:

(a) Bureau funds, staff and other resources must be available to implement the plan;

(b) the plan meets the administrative planning requirements of the Bureau;

(c) the implementation of the plan does not reduce the quantity or quality of services available to Indians; and

(d) the plan provides a basis for the delivery of satisfactory services which will be provided to the Indian people. This is the same standard as the initial criteria for declination which indicates that services should not be harmful to the Indian people.

Any tribe requesting assistance in meeting these requirements, will be assisted by the Bureau. Tribes may use their self-determination grant funds to develop the plan. Tribes can also develop plans by using funds from any other source: other Federal grants, tribal revenues, private foundation grants, etc. Acceptance of the tribal plan by the Bureau does not depend on the source of funds utilized to develop the plan.

This concept enables tribes to require the Bureau to operate programs and deliver services in a manner designed by the tribe without the tribe assuming the administrative responsibility involved in contracting. If the tribe has evaluated a Bureau program and identified deficiencies, the tribe may submit a plan to resolve the problems identified in the operation of the program. If Bureau programs are not well coordinated with other tribal,

state, or Federal programs serving the tribe, a tribe can propose improved coordination by Bureau in the plan. For tribes which know that their administrative machinery must be improved before they assume the responsibility for contracting or for tribes which do not want to allocate their staff resources to the management and administration of contracted programs, this provision offers another tool for the exercise of Self-Determination (and the improvement of services to tribal members).

Some examples of possible uses of this tool follow:

- Using its CETA manpower planning funds, a tribe might develop a plan for the Bureau Employment Assistance Program. The plan could require that funds now used for training tribal members off the reservation be used to train tribal members on the reservation, for jobs available or projected to be available there. More specifically, para-professional health workers or tribal managers could be trained instead of welders or machine operators.

- A tribe might develop a new curriculum plan for use in a Bureau school. The plan might be prepared to place more emphasis on tribal language and culture, include new methods to teach reading, etc.

Effective implementation of this provision will require new levels of cooperation between tribes and the Bureau, (and between the Bureau and other Federal agencies) in the design and operation of programs to serve Indians. The tribe may use this tool to diminish Federal domination of services to Indian people, without losing the advantage of having the Federal Government available to provide services on a day-to-day basis.

D. PERSONNEL TOOLS UNDER THE SELF-DETERMINATION ACT

Whatever approach to self-determination a tribe adopts, it is likely to need new personnel with skills and expertise to help carry out its initiatives or to use the contract and grant tools provided by the Act. Tribes and tribal organizations are free to find the personnel with the necessary capability whereever they can--from within the tribe, from outside or, if they want, from within the Federal Government. The Regulations offer three personnel tools that permits tribes and tribal organizations to acquire the services of Federal employees--persons who can help plan and operate contracted programs, strengthen the capacity of tribal governments, design plans for programs to be operated by the Bureau, or perform other functions which are part of the tribal approach to self-determination. These tools are:

- o The Direct Hire Authority, enables tribal organizations to hire present employees of the Bureau to work in tribal programs. If the tribal organization chooses, and the Bureau employee agree, the employee may retain certain Federal fringe benefits.

- o The 1834 Act (25 U.S.C. 48), permits the tribe to direct activities of Bureau employees, while still being employed by the Bureau.

- o The Intergovernmental Personnel Act, offers tribal organizations the opportunity to secure the temporary services of Bureau or other Federal employees to assist in any aspect of the organization's programs.

1. Direct Hire Authority

A critical issue for tribal organizations operating various programs is the identification of personnel to fill available positions. The Regulations for the Self-Determination Act, in § 275.3 (a) (2) offer tribes the opportunity to hire individuals presently working for the Bureau for positions in tribal programs. This opportunity is most likely to be used in connection with contracting, however it may also be used in many other situations.

The Regulations do not impose requirements on tribal organizations with regard to hiring Bureau employees; they present options:

- o The Regulations do not require tribal organizations to hire the Bureau employees who worked in a particular program prior to contracting;

- The Regulations also allow tribes under the Direct Hire authority to hire Bureau employees to work in any tribal activity, not only those contracted from the Bureau.

- The Regulations do not limit the tribal organization to hiring only those Bureau employees who were working in the program being contracted. Regardless of where the employee works, he or she can be offered a position by the tribal organization. On the other hand, the Regulations do not require Bureau employees to accept employment with a tribal organization.

- If a tribal organization chooses to hire any Bureau employee, the tribal organization may allow the Bureau employee to retain certain Federal fringe benefits if the employee agrees. Those benefits include: Federal health and life insurance, retirement benefits, and workmen's compensation (no other Federal fringe benefits may be retained).

Therefore, if the tribal organization asks a Bureau employee to come to work for it, the employee is free to accept the offer or refuse it and remain with the Bureau. In effect this means that the hiring of any Bureau employee must be negotiated between the tribal organization and the employee, just like the hiring of any other employee. Each party is free to offer or accept whatever terms and conditions of employment it finds suitable. The Bureau will not be involved in those negotiations.

If the tribal organization desires, or if it believes it needs to offer the employee an additional incentive to leave the Bureau and come to work for the tribal organization, it can agree to pay for the Federal fringe benefits that the employee is now receiving from the Government. If the tribal organization agrees to allow the employee to retain fringe benefits, the organization is responsible for paying the cost of the fringe benefits to the Federal Government, which would credit the individual employee's fringe benefit accounts. The tribal organization would pay for the Federal fringe benefits of those employees working on Self-Determination Act contracts directly from the contract funds, otherwise tribal or other funds must be used. The option of allowing Federal employees to retain certain fringe benefits when hired by the tribes is available until December 31, 1985.

As noted in the Contracts discussion, the Regulations require that the tribal organization include in the contract application a "staffing plan, including the extent, if any, that Bureau personnel may be utilized" [§ 271.14]. Therefore tribal organizations will have to make most of their decisions concerning the hiring of Bureau employees while they are preparing the contract application. (Issues which might be considered in

reaching such decisions as well as a possible approach to making the decisions are discussed in the Personnel section of Chapter III, Options and Considerations in the Use of the Tools of the Self-Determination Regulations.)

2. The 1834 Act (25 U.S.C. 48)

a. General Discussion

Rather than actually hire Bureau employees, under an 1834 Act Agreement between a tribal organization and the Bureau, tribal organizations can obtain their services and direct 1/ their activities, while they remain on the Bureau payroll. Tribal organizations which are not tribal governments may use the 1834 Act only if they first obtain explicit authority to do so from the tribal governing body, through a written resolution.

The assignment of Bureau employees cannot be by individual positions. It must be by program and must include all the Bureau employees working for that specific program or portion thereof being contracted, or for all the employees in the portion of a program to continue under Bureau operations. They must work under the terms of their current job descriptions but are under the day-to-day direction of tribal officials.

The 1834 Act may be used in conjunction with contracting or as an alternative to it:

(1) Since tribes may direct Bureau employees in a specific program or portion on a day-to-day basis, while the employees are still employed by the Bureau, the 1834 Act offers tribes another option for influencing Bureau programs without contracting them. By itself, this mechanism does not give tribes control over Bureau program policy, since it requires the employees to perform within the scope of their basis job descriptions, as established by the Bureau. However, by combining the 1834 Act with the tool for tribal planning (redesign) of Bureau operated programs, a tribe could first redesign the program and then direct the employees of that program using the 1834 Act. This would give tribes control over Bureau programs and personnel without having to contract the program.

1/ Tribal government direction of Bureau employees means the tribal chairman or other tribal official, as designated by the tribal governing body, is responsible for the planning, coordination, and completion of the daily on-the-job assignments of Bureau employees. Responsibility for employee evaluation, promotion recommendations and decisions, approval of leave and similar functions remain with the Bureau. The 1834 Act agreement cannot abrogate any employee rights including rights to employee organization representation and appeal of grievances to the Civil Service Commission.

(2) Directing Bureau employees under the 1834 Act also presents a way to ease the transition to total tribal takeover of Bureau programs through contracting. Before a tribe contracts a Bureau program, it may want to get some experience directing it. It can do so by directing the Bureau employees presently working for that program. While day-to-day direction is in the hands of the tribe, the Bureau will continue to administer the program and be responsible for budget, salaries and frivge benefits, procurement, and other administrative functions.

There are three basic conditions which govern the use of the 1834 Act:

- o The work to be done by 1834 Act employees must be work which can be properly vested in the tribe and is in the tribe's direct interest,
- o The tribe must have the capability to offer direction to the Bureau employees,
- o The 1834 Act agreement cannot involve delegation of authorities which must be exercised by a Bureau employee, e.g., trust functions related to trust responsibility, authority in Federal statutes, regulations or tribal constitutions relating to review or approval of tribal action, authority to expand or encumber appropriated Federal funds, placing a tribe or tribal organization in the position of Bureau superintendent, etc.

b. Procedure for Approving the 1834 Act Agreements

Tentative 1834 Act agreements should be worked out between the tribal organization, the Superintendent and the Area Director. The tentative agreement will then be forwarded to the Commissioner who has the final authority to approve such agreements. The Commissioner's authority in this case may not be redelegated.

3. The Intergovernmental Personnel Act (IPA)

a. Purposes of the IPA

IPA provides an opportunity for tribal organizations to obtain the services of Federal employees for temporary periods, to help the tribe carry out tribal goals and objectives, whether or not other tools of the Self-Determination Act are being used. Under IPA an employee from any Federal Agency can be assigned to work for a tribe for up to two (2) years with a possible extension for another two (2) years. It is a way for tribes and tribal organizations to obtain Federal employees with special skills or expertise to help them accomplish specific tasks or projects.

Unlike the 1834 Act, the IPA employees does not have to perform the same work he or she was doing for the Federal Government. Rather, the IPA employees becomes a technical resource to the tribe and may work at any task where his or her skills would benefit the tribe as long as those tasks are mutually agreed upon by the tribe, the employee, and the employee's Agency. Also under the IPA a tribe can request an individual employee, whereas under the 1834 Act it must request all the employees in a particular Bureau program or portion thereof. Finally, under IPA, tribes and tribal organizations may go beyond just the Bureau and seek any Federal employee who has the skills needed by the tribe.

An IPA person might be used for the following purposes:

- Help strengthen tribal governments. For example, a tribe might obtain an employee from the Civil Service Commission with personnel expertise to help a tribe develop and implement a tribal personnel system.

- Assist in the development of a plan for the contracting of a Bureau program. The IPA person might also assist in the implementation of the contracted program by providing technical support to the tribal project manager or by serving as a training resource for staff of the tribal organization; e.g., a forestry expert from the Department of Agriculture might be assigned to help a tribe design and implement a forestry management program; a Bureau manpower expert might assist in tribal planning to take over the Bureau employment assitance program.

- Assist in evaluating and designing other Federal programs serving the tribe. For example, a person working in the Title XX Social Services program in the Bureau of Social and Rehabilitative Services, HEW, might help the tribe negotiate and implement of Title XX social services plan with the state agency; a housing expert from HUD might assist a tribal organization to obtain funds and respond to its housing needs.

In fact almost any function related to tribal activities would be appropriate as a task for an IPA employee. He or she may even represent the tribe in negotiations with the Federal Government on questions involving the tribe's relationship to the Federal Government (so long as the Federal Agency is notified in writing of the individual's status).

The IPA also offers a mechanism to facilitate the transition of contracted programs from Bureau to tribal control. If a tribal organization is unsure at the time it develops its contract application about all its personnel decisions--which Bureau employees does it want to hire, can it find skilled personnel outside the Bureau-it can use the IPA to secure the services of Bureau employees on a temporary basis to perform specific functions in the contracted program under tribal direction. These persons may continue under the direction of the tribal organization for period of the IPA agreement or until the tribal organization makes final decisions concerning the possibility of hiring the Bureau employees, or is able to identify other persons to fill such positions. In effect the tribal organization can put off some of the difficult personnel decisions until it has some experience in actually operating the program.

The tribal organization may receive the services of an IPA person at no cost, or it may have to share the costs with the Federal Agency. Costs to the tribal organization in such case must be negotiated between the tribal organization and the Agency for which the employee works.

b. Securing the Services of a Federal Employee Under the IPA

A tribal organization, seeking the services of a Federal employee to be assigned under the IPA, must make an official request in writing to the Federal Agency for whom the employee works, if the employee has been identified in advance, or to the Bureau, if the tribal organization has no particular individual in mind.

Where a tribal organization has an individual in mind for possible IPA assignment, it is recommended that the tribal organization engage in preliminary conversation with the potential IPA employee and the employing Federal Agency prior to submitting any official request. Such an approach will facilitate the actual assignment of the individual. Where the tribal organization needs assistance but does not have an individual in mind, it should discuss its needs with the Bureau's IPA Coordinator. Each Area Director is required to identify an IPA Coordinator in the Area Office whose job will be to assist tribal organizations to use the resources available under IPA.

For the Bureau the Area Director shall approve requests for IPA assignment for employees under his jurisdiction; the Commissioner will approve assignments for Central Office employees. Other Agencies will have designated individuals responsible for approving IPA assignments for persons whom the tribal organization will have to identify with the assistance of the Bureau IPA Coordinator.

In the case of the IPA, certain provisions apply:

- o The Federal employee must agree to the IPA assignment; he cannot be required to accept it.
- o The Federal employee has the right to retain all Federal benefits.
- o Federal employees on an IPA assignment are still subject to the provisions of Reductions in Force (RIF). Should a RIF be required, they will receive no special consideration because they are on IPA assignment to a tribal organization.

c. Other Resources and Opportunities Provided Through the Intergovernmental Personnel Act

The IPA provides several other additional opportunities which tribal organizations may wish to consider:

(1) An employee of a tribal organization could be assigned to work with a Federal agency under the IPA in order for the individual to obtain experience in work which he or she is to perform for the tribal organization.

(2) Tribal organizations may receive small grants from the Civil Service Commission for improving their personnel management programs or training their employees.

(3) Training can be provided to employees of tribal organizations through fellowships for graduate study or participation in Federal training programs.

(4) The Civil Service Commission is available to provide technical assistance to personnel systems and the design of training courses. Generally, these services must be paid for, however, some short-term assistance may be provided without cost.

CHAPTER III

OPTIONS AND CONSIDERATIONS IN USING THE TOOLS OF THE SELF-DETERMINATION REGULATIONS

This final chapter provides tribal leaders with a range of program ideas, examples, and considerations on the use of the tools provided by the Self-Determination Regulations. It discusses some ways they might be used to deal with the kinds of problems tribal leaders face daily. It also discusses some of the considerations tribes may want to take into account when deciding whether and when to use the tools -- some guides guides for making program decisions. Finally, it shows some of the flexibility and availability in using the tools--how they can be combined, integrated and adapted into a significant resource to help a tribe achieve its major goals.

The ideas and examples presented here are not intended to be exhaustive. Neither do we mean to imply that the implementation of these options by tribal governing bodies will be simple. Rather, it is hoped that they will stimulate tribes to consider the potential of the Regulations in a realistic manner, and encourage them to develop their own creative approaches for utilizing the tools to deal with their own unique tribal needs and objectives.

A. GRANTS: PROGRAM OPTIONS AND IDEAS

The basic purposes of the Self-Determination Grants Program described earlier make this particular tool of the Self-Determination Act an especially important one. Therefore, to the extent possible, the alternative uses for these limited funds should be considered in light of tribal priorities before decisions are made as to how they will be expended. Some of the specific ways in which grants might be used are described in this section. These examples are designed merely as examples to stimulate, not to limit, the thinking of tribal leaders.

1. Strengthening and Improving Tribal Government

This aspect of the Act and Regulations recognizes that the capability of tribal governments to carry out basic governmental functions is an essential element, perhaps the most critical element for many tribes in their self-determination effort. Furthermore, it establishes the principle that self-determination means more than contracting to operate Bureau programs; it also means enhancing tribal sovereignty, apart from or in addition to contracting.

Some possible areas in which Grant funds may be used to strengthen tribal government include:

- Revision of the tribal constitution to define more precisely the powers and responsibilities of tribal officials and bodies in light of increased tribal activities. (For some tribes it might be an opportunity to prepare a written constitution for the first time.);
- Improvment of the tribal judicial branch so it is able to exercise the full range of judicial powers which have been granted to tribes by statutes and court cases over the years;
- Strengthening of the tribe's administrative and management systems so they can better handle the increased responsibilities many tribes have assumed over the past few years;
- Development of a budget analysis capability so that tribal and Bureau funds can be more efficiently allocated to tribal needs;
- Provision of staff support to the tribal chairman so that he can carry out his executive and administrative functions more effectively;
- Preparation of a natural resources development plan in order to build the economic status of the tribe and its members;

- o Maintaining or improving the tribal council facilities;

- o Recruitment and training of new personnel to fill tribal need for new managers and technical personnel.

2. Preparing to Contract Bureau Programs

As we discussed earlier, tribes can carry out a wide range of activities to prepare for contracting of Bureau programs.

a. Situation - A tribe wants to contract one or more Bureau programs being provided on its reservation. Through analysis of existing Bureau programs and tribal priorities, it decides that it should start with the Bureau's Road Maintenance Program.

b. Approach - A tribe may want to use a two-year plan for contracting the Road Maintenance Program.

Year One - Tribe applies for and secures a Self-Determination Grant for preparing to contract the Road Maintenance Program. The tribe could use the grant to perform the following tasks:

(1) Evaluate the existing roads program; then plan how the roads program should be operated once the tribe takes it over; and determine what budget reprogramming may be necessary to implement the program.

(2) Determine where it will get the necessary personnel to run the program. Does the tribe have a person trained as a road engineer, or one with sufficient training so that an intensive program would give him/her the necessary skills by the time the tribe begins operating the program? If not, should it ask the Bureau's road engineer to stay on?

(3) Design and implement training programs for tribal members so they can assume other positions which will be available in the program to be contracted.

(4) Identify what Bureau equipment and property it will need.

(5) Evaluate its accounting, bookkeeping, personnel, and property systems to determine if they are prepared to assume new responsibilties, and make whatever improvements are necessary.

(6) Prepare the contract application, perhaps hiring an outside consultant under the grant, to assist in the preparation.

(7) Once the contract application has been submitted, the tribe could continue working on problems of transition. For example, Grant funds could be used to cover costs during the period when tribal employees actually begin to phase into their positions and Bureau employees leave to assure there is no gap in services, or to develop basic operating procedures for effective program management.

Year Two — The contract is approved as requested, and the tribe takes full operational control of the Road Maintenance Program.

Tying the grant and contracting tools together insures that the contract plan reflects tribal needs and priorities and that the transition is smooth and orderly. This work has been done with grant funds so that tribe does not have to pay the costs out of its own treasury.

3. Influencing Federal Programs and Services to Indian Tribes

Tribes receive services and funds from the Federal Government through a number of channels: services provided directly by Federal employees (BIA, IHS); services from tribal programs funded with Federal dollars (Community Health Representative program, Community Action); services from state programs that are Federally-funded (Title XX Social Services; Vocational Rehabilitation). Tribes may use grant funds to address any of these kinds of programs; however, the regulations impose no obligation on the part of Federal Agencies (other than the BIA) to respond to tribal input and recommendations. Tribes will have to negotiate the changes they are proposing.

For any Federal program or Federally-funded program, a tribe may use its grant funds for such purposes as:

- Identifying new sources of funding for tribal programs from Agencies the tribe has not dealt with before and prepare proposals for such funding.

- Investigating to see if the tribe is receiving its fair share of services or funding from Agencies that are presently working with the tribe and using the evidence produced by the investigation to persuade those Agencies to increase services or funding to the tribe.

- Evaluating the services now being provided by Federal Agencies and other Federally-funded programs to see if they are compatible with tribal priorities and practices. If not, use the findings of the evaluation to push for changes and improvements.

4. Influencing the Operation of the Bureau of Indian Affairs

One of the most important purposes for which tribes can use their Grant funds is to increase their capacity to influence and impact upon the operation of the Bureau. Tribes can use grant funds to redesign and restructure Bureau programs and then have the Bureau implement the tribal plan under the procedures set out in § 272.27 (See Chapter II, part C of this Handbook).

Tribes can also use grant funds to increase their capacity to respond to the Band Analysis. By using grant funds to hire a person to review the Bureau budget on a full-time basis, a tribe can obtain a better understanding of how Bureau funds are now being used and the cost of the various services now being provided by the Bureau. The tribe will then be able to respond with greater precision and detail to the Band Analysis and through that process make the Bureau budget more responsive to tribal needs and priorities.

5. Overall Self-Determination Planning

There is no requirement in the Self-Determination Act or Regulations that tribes develop a self-determination plan or strategy. However, some tribes may wish to lay out an overall plan for use of the tools of the Self-Determination Regulations to guide their actions over a period of time. Such a plan might be of help in assuring that the Grant funds, contracting opportunities, and personnel opportunities provided by the Regulations are used to complement and strengthen the tribe's existing agenda for tribal human and economic development.

B. CONSIDERATIONS IN DECIDING WHETHER TO CONTRACT

This section discusses some of the factors a tribe might want to consider when deciding whether to contract Bureau programs and how to shape its use of contracting to meet its own unique situation. The discussion in this section is intended as a springboard for analysis and planning by tribal policymakers in their internal decision-making processes. The Regulations do not require that a tribe justify to the Bureau why it has decided to contract or not to contract.

A tribe considering contracting should consider several basic planning questions, including:

- What specifically does the tribe gain from contracting?
- What are the possible drawbacks to the tribe from contracting?
- Are there other mechanisms available which will achieve the same gains while imposing fewer drawbacks?

Asking such questions and weighing the competing factors can provide the tribe with a clear statement of what it hopes to gain from contracting. Goals and objectives established as a result of the process can be used to evaluate the success of the contract.

Some of the possible advantages and disadvantages of contracting are examined below and then weighed in light of other alternatives.

1. What the Tribe May Seek to Gain by Contracting the Bureau Program

Contracting offers a number of benefits to tribes. Some of the most common benefits include:

- The tribe feels that it should fully exercise its governmental authority and that therefore the tribe rather than the Bureau, should be operating the programs for its people.
- The tribe feels the basic program plan is adequate but is dissatisfied with the Bureau personnel who are running the program and therefore wants full control over personnel decisions.
- The tribe wants to eliminate the duplication between tribal and Bureau programs by merging Bureau programs into tribal programs.
- The tribe wants to create more jobs for its members.

2. Possible Drawbacks for a Tribe in Contracting

Potential drawbacks or "costs" to a tribe are not insurmountable barriers to successful contracting, but they are factors a tribe may want to take into account when deciding how to use the contracting tool in the most advantageous way. Some of the drawbacks include:

- Many Bureau programs presently are not sufficiently funded to provide the full scope of services needed by the tribal people. Since the funding resources available for a contracted program will not be increased because the tribe contracts the program, the tribe might find that it has assumed responsibility for a program with marked funding inadequacies.

- By contracting, a tribe assumes additional administrative and managerial responsibilities. Key tribal officials will be required to devote time and attention to the contracted program; overall planning, decision-making, and similar issues will have to be considered by top tribal officials. This may diminish the time the key officals have to spend on other tribal priorities.

- Transition from Bureau to tribal control of programs is a complex and time-consuming task. Transition plans must be developed, tribal staff may have to be trained, tribal accounting, personnel, and other systems may have to be strengthened to handle their increased workloads. Grant funds may be available to cover some of the costs of preparing applications, training staff, and gearing up for transition.

3. Weighing the Advantages, Disadvantages, and Alternatives

Each tribe will have its own system for weighing the competing factors and reaching a decision on whether contracting is an appropriate tool for meeting a particular tribal goal or whether other alternatives will enable the tribe to achieve the same benefit as contracting. Below are examples of the kinds of considerations the tribe may want to look at in making their decisions:

- Desired benefit — That the tribe provide services to to its people rather than the Bureau.

  Considerations — Contracting is the only tool that will

enable a tribe to accomplish this objective. An inhibiting factor is that contracting will require a substantial allocation of tribal management time and resources. Many tribes may decide that contracting is a high priority and justifies the allocation of time and resources required by it. Other tribes may decide to apply their management resources to other priorities and for the time being let the Bureau continue to run the program, with tribal input. Each tribe has the right to make its own decision on this issue.

- Desired benefit -- Greater control over the planning and policymaking in Bureau programs.

  Considerations -- Contracting a Bureau program is the most effective method for achieving this objective. However, another possible method is the planning option, where a tribe can develop a new plan for a Bureau program and then require the Bureau to run the program according to the tribal design. This second option frees the tribe from the responsibility for day-to-day management of the program while still allowing it to influence the way the program is run. It does not, however, give the tribe as much control over the program as does contracting.

- Desired benefit -- The tribe wants full control over the personnel running the Bureau program.

  Considerations -- Contracting is the only tool that gives a tribe full control over program personnel; it gives the tribe full authority to hire, fire, and set salaries for program employees. While control over program plans and policy is important, a tribe may feel that it cannot obtain the necessary control over a program until it can control the personnel running the program.

- Desired benefit -- A tribe wants to end duplication between tribal and Bureau programs.

  Considerations -- Contracting is the only tool that permits a tribe to merge tribal and Bureau programs under one roof and one administrator. It also permits tribes to have substantial control over the savings that might accrue from the merger.

- Desired benefit -- A tribe wants more jobs for tribal members.

  Considerations -- Contracting will probably not create any new jobs. It will, however, permit the tribe to replace any non-tribal Bureau employees with tribal members. If there are no tribal members with the necessary skills to assume certain jobs,

be might first want to provide training for some of its people before it contracts the program.

4. Long-Range Planning for Contracting

The benefits and the drawbacks of contracting mentioned do not make a case either for or against contracting. They do make clear that decisions on contracting involve a variety of competing factors and that thorough analysis of the pros and cons is necessary to assure that the tribe accomplishes its objectives.

One approach tribes might consider as they examine the possibility of contracting is the development of a comprehensive long range planning strategy for the contracting of Bureau programs. Such a strategy, including what programs to contract and when, should be useful for internal tribal planning purposes, defining what the tribe wants to accomplish with contracting.

C. CONSIDERATIONS IN SECURING PERSONNEL FOR CONTRACTED PROGRAMS

This section discusses some of the issues to be considered by tribal organizations in deciding whether to use Bureau employees in contracted programs under the staffing authorities provided by the Regulations.

The Regulations contain two provisions which make it essential that a tribal organization decide, prior to submitting the contract application, how it wishes to utilize Bureau personnel.

- The Regulations require that a tribal organization include in its contract application "a staffing plan including the extent, if any, that concerning Bureau personnel may be utilized. [§ 271.14]

- A contract application must be submitted at least 120 days before the contract's starting date whenever the jobs of Bureau employees will be affected by contracting. [§ 271.21]

These provisions require that the tribal organization must consider some difficult questions concerning the hiring of Bureau personnel before the preparation of the contract application. Tribes should examine the alternatives before making a decision. Our objective here is to present some of the factors tribal organizations should consider in reaching their decision.

1. Considerations In Hiring Bureau Employees

Before deciding whether to hire Bureau employees, a tribal organization might consider the following issues:

- Is the tribal organization satisfied with the performance of the present Bureau employees? All employees? Some employees?

- Which positions are the tribal organizations likely to have trouble filling, because persons with required skills are not on the reservation or may not be willing to move to the reservation? How long would it take the tribal organization to train a replacement and what might be the effect of that situation on tribal progress in operating the contracted program?

- Are there any qualified persons, particularly tribal members, working for the Bureau in other places who might be willing to work for the tribe.

- Which Bureau positions in the program to be contracted are now held by tribal members? Should tribal members working for the BIA be given special consideration in retaining their jobs?

Once the tribal organization decides its want to hire a particular Bureau employee, it must decide what salary and fringe benefits to offer. The tribal organization must balance factors such as "what will it take to get the Bureau employee to come to work for the tribal organization," versus, "what can the tribe afford to spend from the contract budget" and "what can we offer, given the existing salary and fringe benefit levels of other tribal employees." Balancing these factors involves considering such difficult questions as:

- Should the tribe match the Bureau's salary scale even if the Bureau salary would be higher than that applicable to other persons working for the tribe in similar position? What should the tribe do if it must have specific technical capabilities but the Bureau employee's salary is higher than the tribe would generally pay for similar work?

- Should the tribal organization allow Bureau employees to retain their fringe benefits although those benefits may be higher than those provided to other tribal employees? Will having a different fringe benefit program for different employees create administrative and morale problems.

2. Decision-Making Steps in Hiring Bureau Employees

To facilitate the process of decision-making concerning the hiring of Bureau employees, tribal organizations are encouraged to consider taking the following steps as part of the development of their contract applications:

- Prepare or analyze the position descriptions for jobs under the proposed contract to determine the qualifications of personnel required to perform the work.

- Secure from the Bureau a list of Bureau employees presently working in the program to be contracted along with their GS levels, and the costs of their Federal fringe benefits.

- Review tribal position descriptions in relation to the knowledge and experience of Bureau employees presently working in the program to be contracted.

- Determine how the tribe initially plans to secure personnel to run the contracted program. Factors to consider may include:

  a. Hiring existing Bureau's employees;

  b. Securing the services of Bureau employees through the 1834 Act;

  c. Securing the services of Bureau (or other Federal) employees through the IPA;

  d. Hiring tribal members not working for the Bureau;

  e. Hiring from some other source; or

  f. Using a combination of sources.

Where use of the 1834 Act or IPA is planned, a tribal organization should follow the procedures described earlier in Chapter II, Section D. Where use of the Direct Hire Authority is contemplated, the following additional steps might be taken:

- Establish a negotiating position to use in discussing possible employment with Bureau employees whom the tribe wants to hire. The negotiating position should include a proposed salary and whether fringe benefits will be provided, and the extent of those fringe benefits.

- Discuss with those Bureau employees, prior to the filing of the contract application, the possibility of their coming to work for the tribal organization.

- Before the application is submitted reach tentative decisions regarding hiring of Bureau personnel. On the basis of these decisions prepare the staffing plan for the proposed contract application and consider its effect on the proposed budget.

Should the contract be approved, and should the tribal organization decide to hire Bureau personnel and allow them to retain certain fringe benefits, the tribal organization and the employee must enter into a mutual agreement concerning the fringe benefits <u>before</u> the employee actually leaves Federal service.

Early planning on personnel issues using this or a similar approach which may be more appropriate for a particular tribe, should make the transition easier for the tribe, the Bureau, and the employees involved.

D. INTEGRATING SELF-DETERMINATION TOOLS -- WITH EXAMPLES

Each of the four main tools provided by the Act — grants, contracting, tribal planning for Bureau-operated programs, and personnel — give tribes new ways to solve tribal problems and achieve their priorities. The greatest potential of the Act comes from the variety of ways the tools can be integrated. Like the different materials in a construction project, the tools can be used together to build more responsive and effective programs for tribes and to make tribal self-determination a reality.

This section offers four examples of how the tools can be combined to produce innovative solutions to real problems now facing tribes. The examples only begin to scratch the surface of what is possible using the Regulations. They are presented to stimulate tribal policymakers to consider the major issues or problems confronting their tribes, and to explore how the tools of the Indian Self-Determination Act can be used to design possible solutions to these problems. Bureau staff is available, at tribal request, to assist tribes in exploring the options and opportunities.

Example One:

a. Situation — A tribe may not want to contract and take on the burden of additional program responsibilities. Instead, its priority may be to strengthen its tribal government by improving its management system and upgrading the skills of personnel working with the tribal government.

b. Approach -- The tribe can begin by using a Self-Determination Grant to evaluate existing management practices and recommend new ones. It can use the IPA to obtain a management expert from the Bureau or any other federal agency to head that effort.

It can also use the Bureau's Employment Assistance Program as a source of training funds for management staff. Using the planning option, it can develop a new plan to redesign the local Employment Assistance Program which shifts priorities from the areas on which it is presently focusing to an emphasis on management training. The Employment Assistance Program would then use its resources to provide short term management training for present tribal managers and long-range training for younger tribal members so that they can acquire management skills.

Combining the three tools, grants, planning and personnel, gives the tribe a relatively comprehensive program for improving tribal management capability.

Example Two:

a. Situation -- A tribe may be concerned about the fragmentation of existing social services programs serving its tribal members. For instance, programs now available to the tribes may include the Bureau Social Services Office; IHS Social Services; Tribal Community Action, Food Stamps and Commodities, Community Health Representatives, and Tribal Emergency fund; and State Title XX Social Services. Persons seeking services may be referred from one program to the next without receiving comprehensive solutions to their problems. At the same time the overlap of services and the cost of administrative overhead takes funds away from needed direct services.

b. Approach: A tribe could decide to develop a three-year plan to achieve a comprehensive coordinated social services program.

Year One: Using a Self-Determination Grant and the assistance of a Bureau Social Services person assigned to the tribe under IPA, the tribe evaluates all of the programs. It then develops a plan for integrating them into a single operation which can offer a comprehensive package of services and resources to persons seeking seeking help. (The Act authorizes tribes to evaluate and plan Federal or Federally-funded State programs such as Title XX Social Services but does not require that these programs accept tribal recommendations, only the Bureau must accept these recommendations.)

Year Two:

(1) All tribally-operated programs (CHR, Food Stamps, CAP, etc.) are redesigned to comply with the comprehensive plan.

(2) The tribe requests using its planning option, that the Bureau operate its Social Services Program according to the comprehensive plan.

(3) A tribe can request a State to incorporate the tribal plan into its Title XX Social Services Program, using as leverage the fact that certain of its tribal social services funds and certain Bureau funds can be used as Title XX matching funds to persuade the State to adopt the tribal plan.

Year Three: Same as Year Two except now the tribe contracts for operating the Bureau and IHS social services programs and merges them into the comprehensive tribal program. The tribe uses the savings which may be produced by the reduction in administrative costs to expand the amount of services available to tribal members.

Example Three:

a. Situation — A tribe is concerned about the inadequate services available to its elderly members provided by the Bureau, IHS, or the Elderly Programs of the States (funded by HEW's Administration on Aging). While the life expectancy is rising rapidly in the tribe, none of the Agencies has developed programs to meet the basic needs of its elderly members and use their wisdom and experience which is valuable cultural resource for the tribe.

b. Approach — An effective tribal strategy to deal with this situation might include the following steps:

(1) A tribe can use the funds and authority provided under the grants Regulations to evaluate the services it is receiving under the Older Americans Act and use the evaluation report to make its case to the Commissioner on Aging (HEW) for more services to its members. The Older Americans Act contains specific provisions to permit a tribe to obtain redress when it can show that the tribe failed to receive its proper share of services from state Elderly Program.

(2) If the tribe receives some services, but needs a facility to house its program or to serve as a home for the elderly on the reservation, it can use its Self-Determination Grant funds as matching share for a variety of facility construction programs offered by the Federal Government. It can ask the Bureau to assist in identifing those sources, using the rights provided tribes in § 272.33 of the Regulations.

(3) The tribe could contract with the Bureau to operate a program serving the elderly. While the Bureau may not be providing this service, the service is clearly authorized under the Snyder Act. Therefore, the tribe can use the provision for contracting programs the Bureau is authorized to provide but is not presently providing to contract a program to serve the elderly. In those instances where there are no Bureau funds earmarked for elderly programs for the tribe, the tribe may request the Bureau to reprogram funds from other existing Bureau programs serving the tribe.

Example Four:

a. Situation — A tribe may be unsure of what the Self-Determination Act means to it. The Regulations are long and the possible implications are complex. The tribal governing body and tribal members need more time to study the Act and Regulations and analyze their significance for their particular tribe. Does the Act offer the tribe something useful or are there negative implications for the tribe?

b. Approach — A tribe has several options:

(1) It can ignore the Act and continue with its present tribal plans and priorities. There is no penalty for not using the Act.

(2) A tribe can use its first Self-Determination Grant to analyze the Act and Regulations to determine what the benefits or dangers may be and to develop a strategy for how it does or does not want to use the tools provided in the Regulations. Using a grant in this way does not obligate a tribe to contract or take any other steps in the future.

(3) The tribe may use its grant funds for other purposes and ask the Bureau to help it examine the Act and explore its implications.

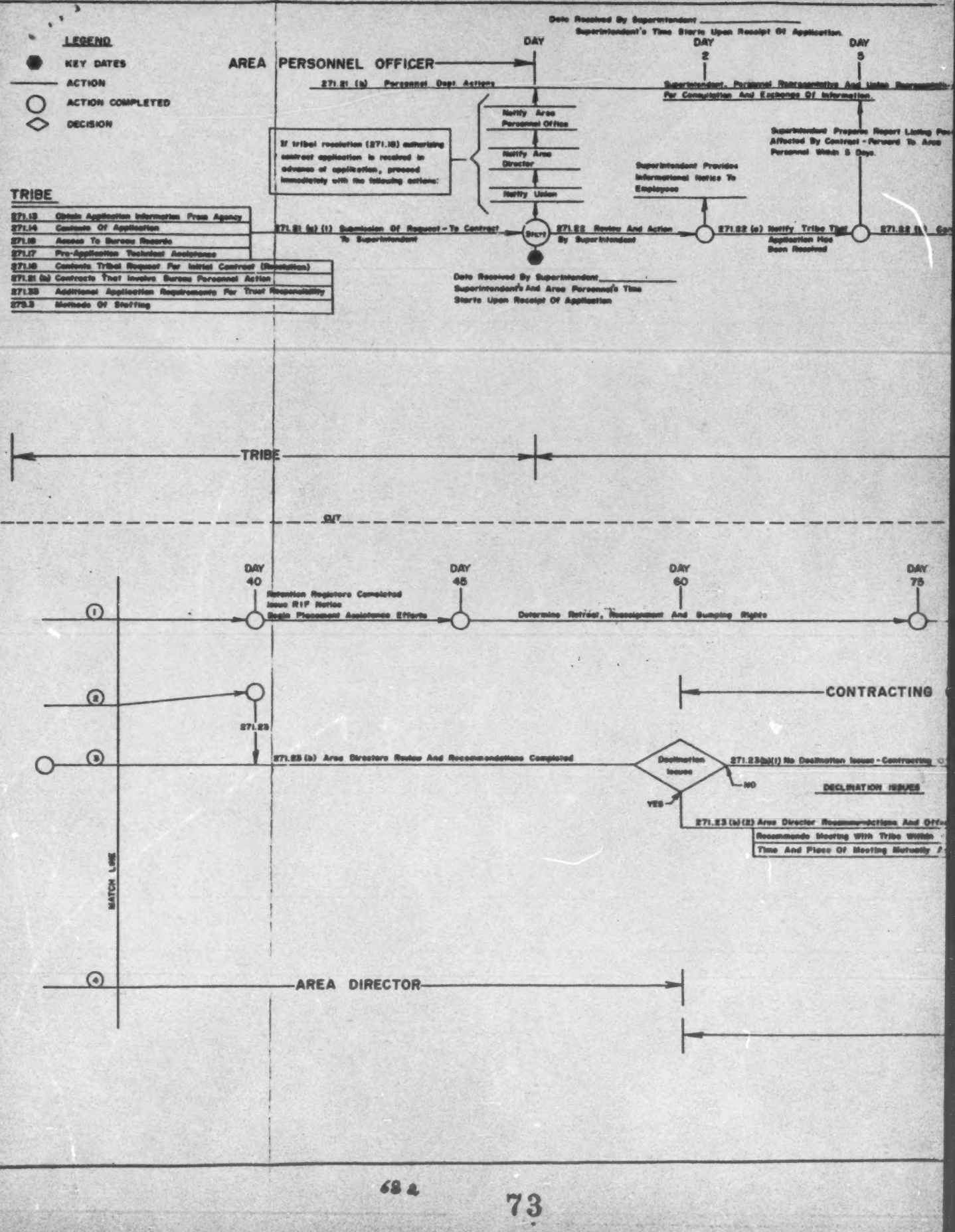
Flow Chart for Contracting Actions

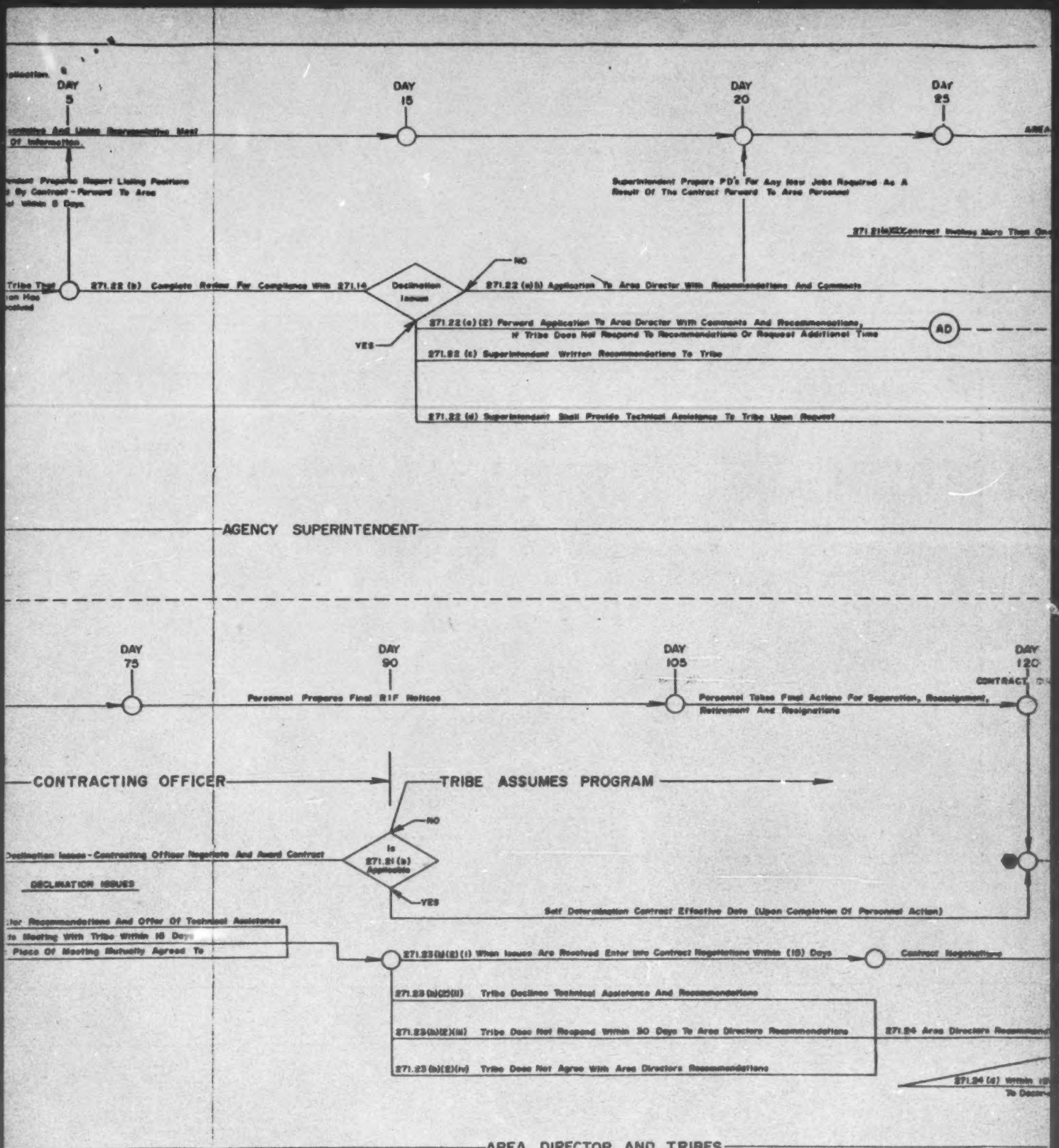
The following chart has been developed (1) to provide an easily understood synopsis of actions from submission of contract application through the negotiations of a contract, and (2) to facilitate monitoring of the action flow process. Space has been included on the chart for entering appropriate dates if it is to be used for the latter purpose.

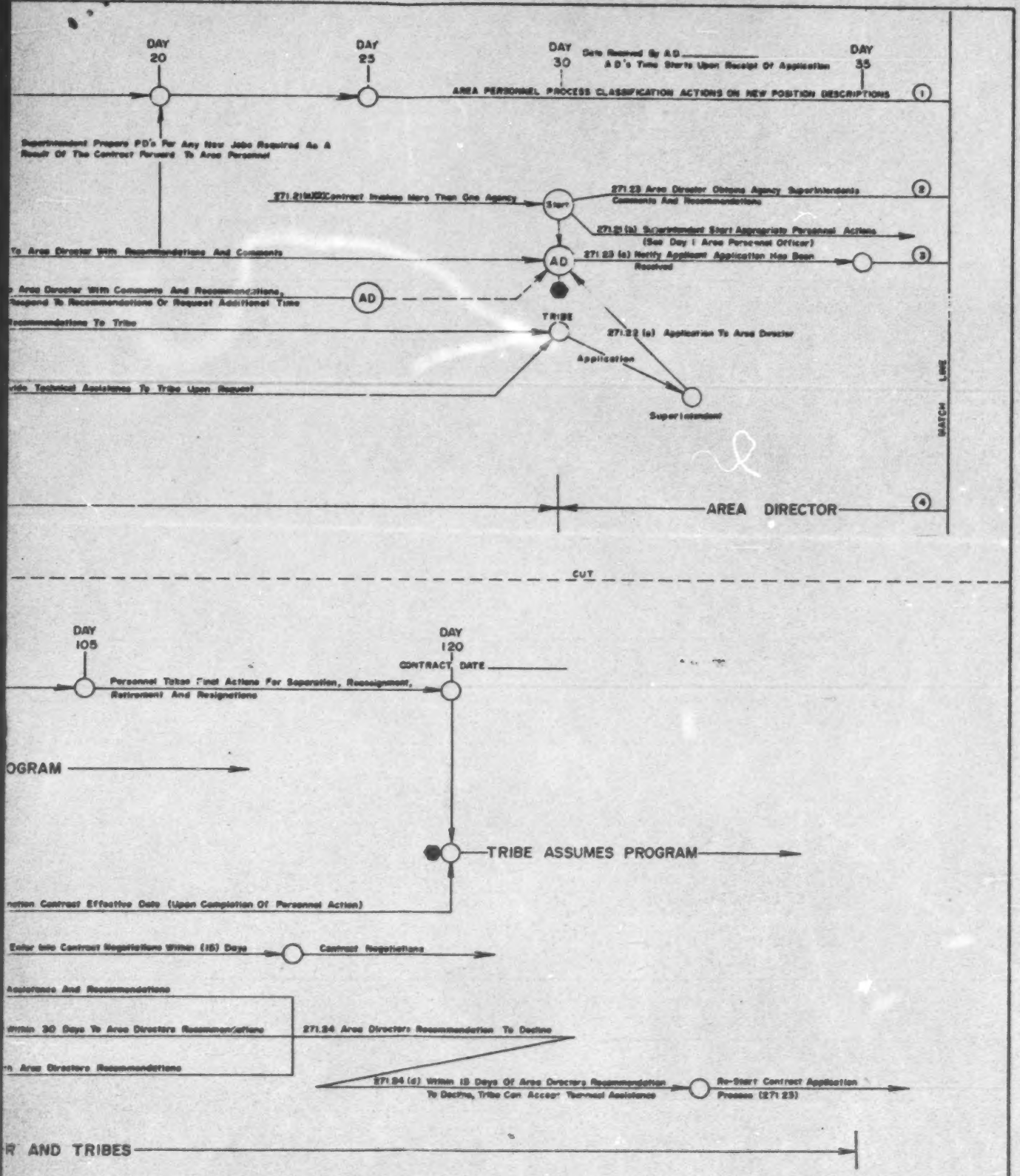
We are incorporating the flow chart into this handbook so that decision makers can better plan for assumption of the operation of Bureau programs serving the tribe. For example, Tribal leaders can use the chart to help determine the latest possible date for submission of a contract application if the contract is to begin on the date specified in the application.

Additional copies of the chart may be obtained from Bureau of Indian Affairs Agency and Area offices if the tribe wishes to track each individual contract request.

* U. S. GOVERNMENT PRINTING OFFICE : 1976 201-610/2072


LEGEND
KEY DATES
ACTION
ACTION COMPLETED
DECISION
AREA PERSONNEL OFFICER
Date Received By Superintendent
Superintendent's Time Starts Upon Receipt Of Application
DAY
DAY 2
DAY 5
271.21 (b) Personnel Dept Actions
Per Consultation And Exchange Of Information
Notify Area Personnel Office
Notify Area Director
Notify Union
If tribal resolution (271.10) authorizing contract application is received in advance of application, proceed immediately with the following actions:
Superintendent Provides Informational Notice To Employees
Superintendent Prepares Report Listing Per... Affected By Contract - Forward To Area Personnel Within 5 Days.
TRIBE
271.13 Obtain Application Information From Agency
271.14 Contents Of Application
271.16 Access To Bureau Records
271.17 Pre-Application Technical Assistance
271.18 Contents Tribal Request For Initial Contract (Resolution)
271.21 (a) Contracts That Involve Bureau Personnel Action
271.23 Additional Application Requirements For Trust Responsibility
273.3 Methods Of Staffing
271.21 (a) (1) Submission Of Request - To Contract To Superintendent
START
271.22 Review And Action By Superintendent
271.22 (a) Notify Tribe That Application Has Been Received
Date Received By Superintendent
Superintendent's And Area Personnel's Time Starts Upon Receipt Of Application
TRIBE
DAY
DAY 40
DAY 45
DAY 60
DAY 75
Retention Registers Completed
Issue RIF Notice
Begin Placement Assistance Efforts
Determine Retreat, Reassignment And Bumping Rights
CONTRACTING
271.23
271.23 (b) Area Directors Review And Recommendations Completed
Declination Issues
271.23(b)(1) No Declination Issues - Contracting
NO
YES
DECLINATION ISSUES
271.23 (b)(2) Area Director Recommendations And Offe...
Recommends Meeting With Tribe Within ...
Time And Place Of Meeting Mutually ...
MATCH LINE
AREA DIRECTOR


DAY 5
DAY 15
DAY 20
DAY 25
Of Information.
Superintendent Prepare PD's For Any New Jobs Required As A Result Of The Contract Forward To Area Personnel
271.22 (b) Complete Review For Compliance With 271.14
Declination Issues
NO
271.22 (a)(1) Application To Area Director With Recommendations And Comments
YES
271.22 (a)(2) Forward Application To Area Director With Comments And Recommendations, If Tribe Does Not Respond To Recommendations Or Request Additional Time
AD
271.22 (c) Superintendent Written Recommendations To Tribe
271.22 (d) Superintendent Shall Provide Technical Assistance To Tribe Upon Request
AGENCY SUPERINTENDENT
DAY 75
DAY 90
DAY 105
DAY 120
Personnel Prepares Final RIF Notices
Personnel Takes Final Actions For Separation, Reassignment, Retirement And Resignations
CONTRACTING OFFICER
TRIBE ASSUMES PROGRAM
NO
Is 271.21 (b) Applicable
YES
Declination Issues - Contracting Officer Negotiate And Award Contract
DECLINATION ISSUES
Self Determination Contract Effective Date (Upon Completion Of Personnel Action)
271.23 (b)(2)(i) When Issues Are Resolved Enter Into Contract Negotiations Within (10) Days
Contract Negotiations
271.23 (b)(2)(ii) Tribe Declines Technical Assistance And Recommendations
271.23 (b)(2)(iii) Tribe Does Not Respond Within 30 Days To Area Directors Recommendations
271.23 (b)(2)(iv) Tribe Does Not Agree With Area Directors Recommendations
AREA DIRECTOR AND TRIBES


DAY 20
DAY 25
DAY 30
Date Received By A.D. _____
A.D.'s Time Starts Upon Receipt Of Application
DAY 35
AREA PERSONNEL PROCESS CLASSIFICATION ACTIONS ON NEW POSITION DESCRIPTIONS
1
Superintendent Prepare PD's For Any New Jobs Required As A Result Of The Contract Forward To Area Personnel
271.21(b)(2) Contract Involves More Than One Agency
Start
271.23 Area Director Obtains Agency Superintendents Comments And Recommendations
2
271.23 (b) Superintendent Start Appropriate Personnel Actions (See Day 1 Area Personnel Officer)
To Area Director With Recommendations And Comments
AD
271.23 (c) Notify Applicant Application Has Been Received
3
Area Director With Comments And Recommendations, Respond To Recommendations Or Request Additional Time
AD
Recommendations To Tribe
TRIBE
271.22 (a) Application To Area Director
Application
Provide Technical Assistance To Tribe Upon Request
Superintendent
BATCH LINE
AREA DIRECTOR
4
CUT
DAY 105
DAY 120
CONTRACT DATE _____
Personnel Takes Final Actions For Separation, Reassignment, Retirement And Resignations
PROGRAM
TRIBE ASSUMES PROGRAM
Contract Effective Date (Upon Completion Of Personnel Action)
Enter into Contract Negotiations Within (15) Days
Contract Negotiations
Assistance And Recommendations
Within 30 Days To Area Directors Recommendations
271.24 Area Directors Recommendation To Decline
Area Directors Recommendations
271.24 (d) Within 10 Days Of Area Directors Recommendation To Decline, Tribe Can Accept Technical Assistance
Re-Start Contract Application Process (271.23)
AND TRIBES

BUREAU OF INDIAN AFFAIRS

CONTRACT APPLICATION REVIEW AND ACTION PROCESS

P.L. 93-638 INDIAN SELF DETERMINATION ACT

19 November 1975

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